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320 I.A. 133

In the Matter of the Estate of  
GILES McCLENDON, an incompetent,  
now deceased,

APPEAL FROM

MAUD FLOWERS, Executrix of the Last  
Will and Testament of Giles McClendon,  
deceased,

CIRCUIT COURT

Appellant,

COOK COUNTY.

v.

AMERICAN NATIONAL BANK & TRUST CO.,  
Conservator,

Appellee.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Letters of conservatorship were issued to the Straus National Bank & Trust Company on November 9, 1928 in the matter of the estate of Giles McClendon, incompetent, and it thereupon qualified as conservator. The name of the bank was later changed to American National Bank & Trust Company. On May 7, 1929 the conservator filed in the Probate Court of Cook County its inventory of the assets of the estate. On January 18, 1930 an amended inventory was filed. On January 30, 1930 the conservator filed its first annual report and account covering the period from the date of appointment to and including December 31, 1929. On April 17, 1930 a supplemental inventory was filed. These reports and accounts were approved. On January 16, 1935 Giles McClendon, the ward, died testate at Chicago. The will was filed on May 16, 1935 and was admitted to probate on July 24, 1935. On September 9, 1935 Maud Flowers, who was nominated by the testator to be executrix, was appointed administratrix to collect. On March 30, 1939, at the conclusion of a suit to contest the will, Maud Flowers was appointed and qualified as executrix under the will. The conservator did not file any annual account from the time of the filing of the first report and account in January, 1930 to and including the date of the death of the ward. On April 7, 1936 (subsequent to the death of the ward) the conservator filed its final account. Maud Flowers, executrix, filed objections to the final account. On June 12, 1936 the Probate Court

In the matter of the estate of  
Giles McGlendon, an incompetent,  
now deceased,

MAUD FLOWERS, executrix of the last  
will and testament of Giles McGlendon,  
deceased,

Appellant,

AMERICAN NATIONAL BANK & TRUST CO.,  
Conservator,

Appellee.

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Bank & Trust Company. On May 7, 1929 the conservator filed in the

Probate Court of Cook County its inventory of the assets of the estate.

On January 18, 1930 an amended inventory was filed. On January 30,

1930 the conservator filed its first annual report and account covering

the period from the date of appointment to and including December 31,

1929. On April 17, 1930 a supplemental inventory was filed. These

reports and accounts were approved. On January 18, 1935 Giles

McGlendon, the ward, died testate at Chicago. The will was filed on

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1935 Maud Flowers, who was nominated by the testator to be executrix,

was appointed administratrix to collect. On March 30, 1936, at the

conclusion of a suit to contest the will, Maud Flowers was appointed

and qualified as executrix under the will. The conservator did not

file any annual account from the time of the filing of the first report

and account in January, 1930 to and including the date of the death of

the ward. On April 7, 1936 (subsequent to the death of the ward) the

conservator filed its final account. Maud Flowers, executrix, filed

objections to the final account. On June 12, 1936 the Probate Court



overruled the objections and approved the account and report, subject to future hearings upon the question of attorneys' fees and conservator's fees. No appeal was taken from this order. Subsequent to March 30, 1939 the executrix filed amended objections to the final report. Thereafter, she filed an amendment to her amended objections. She also filed a verified petition, praying that the court order the conservator to deliver up to her as executrix certain property therein enumerated and all other property held by the conservator at the time of the ward's death. She also filed a motion to vacate the order entered on March 31, 1936, approving the final account, and asked that the conservator be surcharged as to certain disbursements. On May 2, 1941 the Probate Court entered an order overruling the objections and motions of the executrix, and allowing \$750 as additional fees to the conservator, \$3,000 as additional fees to George C. Adams, its attorney, and \$250 to Joseph Kohn for special services pursuant to an order of the Probate Court. Maud Flowers, as executrix, appealed from this order to the Circuit Court. The matter was referred to a Master in Chancery. Before the Master, stipulations were entered into between the parties with respect to the services rendered by Mr. Adams, as attorney for the conservator, and as to the value of such services, and also with respect to the services rendered by the conservator and as to the value of such services. There was no evidence offered to show there was any mismanagement of the estate by the conservator. The Master, among other things, stated that "the record in this estate discloses such neglect, poor judgment and bad management that it should not be paid any further fees," and he recommended the disallowance of the claim for fees. Both parties filed objections. These objections were permitted to stand as exceptions. The Circuit Court entered a decree on April 13, 1942 finding that the order of the Probate Court, entered June 12, 1936 approving the conservator's account, was res judicata. The Circuit Court found further that the Probate Court, in the order of June 12, 1936,

overruled the objections and approved the account and report, subject to future hearings upon the question of attorneys' fees and conservator's fees. No appeal was taken from this order. Subsequent to March 30, 1938 the executrix filed amended objections to the final report. Thereafter, she filed an amendment to her amended objections. She also filed a verified petition, praying that the court order the conservator to deliver up to her as executrix certain property therein enumerated and all other property held by the conservator at the time of the ward's death. She also filed a motion to vacate the order entered on March 31, 1938, approving the final account, and asked that the conservator be surcharged as to certain disbursements. On May 2, 1941 the Probate Court entered an order overruling the objections and motions of the executrix, and allowing \$750 as additional fees to the conservator, \$3,000 as additional fees to George G. Adams, its attorney, and \$250 to Joseph Kohn for special services pursuant to an order of the Probate Court. Mandi Flowers, as executrix, appealed from this order to the Circuit Court. The matter was referred to a Master in Chancery. Before the Master, stipulations were entered into between the parties with respect to the services rendered by Mr. Adams, as attorney for the conservator, and as to the value of such services, and also with respect to the services rendered by the conservator and as to the value of such services. There was no evidence offered to show there was any mismanagement of the estate by the conservator. The Master, among other things, stated that "the record in this estate discloses such neglect, poor judgment and bad management that it should not be paid any further fees," and he recommended the disallowance of the claim for fees. Both parties filed objections. These objections were permitted to stand as exceptions. The Circuit Court entered a decree on April 13, 1942 finding that the order of the Probate Court, entered June 12, 1938 approving the conservator's account, was erroneous. The Circuit Court found further that the Probate Court, in the order of June 12, 1938,



retained jurisdiction only for the purpose of fixing the fees of the conservator and its attorney. The court found that the only question properly before the court on that appeal was the amount, if any, of additional fees for the conservator and its attorney. In its decree the Circuit Court found that the orders of the Probate Court of January 18, 1930 and June 12, 1936 were res judicata and that the order of the Probate Court entered May 2, 1941, allowing an additional sum of \$750 to the conservator and an additional sum of \$3,000 to Mr. Adams, its attorney, was proper, and that the order authorizing the conservator to use the assets of the ward for the purpose of reimbursing itself on account of overdrafts and to make payment on the other items authorized, was also proper. The executrix appeals from this decree.

On June 12, 1936 the Probate Court overruled the objections of the executrix and approved the final report, subject to a future hearing upon the question of fees for the conservator and its attorney. No appeal was taken from this order. Prior to the entry of this order there was a full hearing, lasting several days. We agree with the Circuit Court that the order of June 12, 1936 was res judicata as to the account. The only matter which remained for determination was the question of additional fees. We have carefully inspected the record and are convinced that the additional fees allowed to the conservator and Mr. Adams, its attorney, are reasonable. Perceiving no error in the record, the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

retained jurisdiction only for the purpose of fixing the fees of the conservator and its attorney. The court found that the only question properly before the court on that appeal was the amount, if any, of additional fees for the conservator and its attorney. In its decree the Circuit Court found that the orders of the Probate Court of January 18, 1930 and June 12, 1938 were not invalid and that the order of the Probate Court entered May 2, 1941, allowing an additional sum of \$750 to the conservator and an additional sum of \$3,000 to Mr. Adams, its attorney, was proper, and that the order authorizing the conservator to use the assets of the ward for the purpose of reimbursing itself on account of overpayments and to make payment on the other items authorized, was also proper. The executrix appeals from this decree. On June 12, 1938 the Probate Court overruled the objections of the executrix and approved the final report, subject to a future hearing upon the question of fees for the conservator and its attorney. No appeal was taken from this order. Prior to the entry of this order there was a full hearing, lasting several days. We agree with the Circuit Court that the order of June 12, 1938 was not invalid as to the account. The only matter which remained for determination was the question of additional fees. We have carefully inspected the record and are convinced that the additional fees allowed to the conservator and Mr. Adams, its attorney, are reasonable. Perceiving no error in the record, the decree of the Circuit Court of Cook County is affirmed.

DECEASED ATTORNEY.

HEBEL AND KILLY, JJ. CONCUR.



42517

IRMA M. MOLT,

Appellant,

v.

FREDERICK F. MOLT,

Appellee.

320 I.A. 133  
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Frederick F. Molt and Irma M. Molt were married on October 5, 1904. On July 28, 1939, Mrs. Molt filed a complaint for divorce in the Circuit Court of Cook County and by a decree entered on August 4, 1939, finding him guilty of desertion, the bonds of matrimony were dissolved. They were the parents of two boys and a girl, all of whom were of legal age at the time of the decree. The defendant was ordered to pay \$55 per week as alimony from the date of the entry of the decree. He was a well known oral surgeon, practicing in Chicago. On October 4, 1940 he filed a petition for a reduction of alimony. After a full hearing the prayer of the petition was denied and the petition was dismissed for want of equity. On May 28, 1942 defendant filed a second petition to reduce the alimony, setting up, among other things, that in January, 1942 he was called to active duty, being a Commander in the United States Naval Reserve Dental Corps; that he closed his office, gave up his private practice and was assigned to the Great Lakes Naval Training Station; that his pay and allowance for housing and subsistence amount to \$481 per month; that from this he had to furnish his own food and lodging, together with certain items of uniform, train fares, etc.; that the net sum after the deduction of such items did not warrant the payment of \$55 per week as alimony; that he was in debt in the sum of \$1,250, which represented money borrowed

IRMA M. WOLF

Respondent

FREDERICK F. WOLF

Petitioner

Circuit Court

Cook County

In re: IRMA M. WOLF, Petitioner vs. FREDERICK F. WOLF, Respondent

Petitioner F. Wolf and Irma M. Wolf were married on

October 2, 1904. On July 28, 1932, Mrs. Wolf filed a complaint for

divorce in the Circuit Court of Cook County and by a decree entered

on August 4, 1932, finding him guilty of desertion, the bonds of

marriage were dissolved. They were the parents of two boys and

a girl, all of whom were of legal age at the time of the decree.

The defendant was ordered to pay \$55 per week as alimony from the

date of the entry of the decree. He was a well known oral surgeon,

practicing in Chicago. On October 4, 1940 he filed a petition for

a reduction of alimony. After a full hearing the prayer of the

petition was denied and the petition was dismissed for want of equity.

On May 28, 1942 defendant filed a second petition to reduce the

alimony, setting up, among other things, that in January, 1942 he

was called to active duty, being a Commander in the United States

Naval Reserve Dental Corps; that he closed his office, gave up his

private practice and was assigned to the Great Lakes Naval Training

Station; that his pay and allowance for housing and subsistence

amount to \$41 per month; that from this he had to furnish his own

food and lodging, together with certain items of uniform, train

fare, etc.; that the net sum after the deduction of such items

did not warrant the payment of \$55 per week as alimony; that he

was in debt in the sum of \$1,250, which represented money borrowed



by him in order to continue the alimony payments, and that under the circumstances it was inequitable that he be required to continue paying his former wife \$55 per week. Plaintiff answered with allegations of fact and exhibits urged in opposition to his motion. The matter was referred to a Special Commissioner to take testimony and make recommendations. He recommended that the decree be modified by reducing the alimony payments to \$35 per week and that defendant pay to plaintiff for her attorney's fees in the instant matter the sum of \$100. The Special Commissioner, contrary to the approved practice, did not give the parties an opportunity to file objections to his report before presenting it in final form to the court. On July 10, 1942, the day the Special Commissioner's report was presented to the court, the attorney representing the plaintiff and who was familiar with the case, was out of the city. An associate of this attorney asked that the matter be postponed until July 13, 1942, when the absent attorney could appear, stating that no other person in the firm had any knowledge of the matter. The Chancellor declined to postpone the matter and (on July 10, 1942) entered an order in accordance with the recommendations of the Special Commissioner, stating orally that such order would be subject "to the right to vacate the same". On July 21, 1942 plaintiff filed a motion and a petition to vacate the order of July 10, 1942 and for a re-reference. Plaintiff was permitted to file objections to the Master's report, nunc pro tunc as of July 10, 1942. The motion to vacate the order of July 10, 1942 and the objections to the Special Commissioner's report were fully argued before another Chancellor. On July 30, 1942 he overruled the motion to vacate and the exceptions. In appealing, plaintiff prays that the orders entered on July 10, 1942 and July 30, 1942 be reversed.

In the decree of divorce the court found that the parties had adjusted and settled their property rights by a contract dated

by him in order to continue the alimony payments, and that under the circumstances it was inadvisable that he be permitted to continue paying his former wife \$50 per week. Plaintiff answered with allegations of fact and exhibits urged in opposition to his motion. The matter was referred to a Special Commissioner to take testimony and make recommendations. He recommended that the decree be modified by reducing the alimony payments to \$25 per week and that defendant pay to plaintiff for her attorney's fees in the instant matter the sum of \$100. The Special Commissioner, contrary to the approved practice, did not give the parties an opportunity to file objections to his report before presenting it in final form to the court. On July 10, 1942, the day the Special Commissioner's report was presented to the court, the attorney representing the plaintiff and who was familiar with the case, was out of the city. An associate of this attorney asked that the matter be postponed until July 12, 1942, when the absent attorney could appear, stating that no other person in the firm had any knowledge of the matter. The Chancellor declined to postpone the matter and (on July 10, 1942) entered an order in accordance with the recommendations of the Special Commissioner, stating orally that such order would be subject "to the right to vacate the same". On July 21, 1942 plaintiff filed a motion and a petition to vacate the order of July 10, 1942 and for a rehearing. Plaintiff was permitted to file objections to the Master's report, made and made as of July 10, 1942. The motion to vacate the order of July 10, 1942 and the objections to the Special Commissioner's report were fully argued before another Chancellor. On July 20, 1942 he overruled the motion to vacate and the exceptions. In overruling plaintiff prays that the orders entered on July 10, 1942 and July 20, 1942 be reversed. In the decree of divorce the court found that the parties had adjusted and settled their property rights by a contract dated



July 28, 1939, which the court declared was fair and equitable. The preamble of the contract recited that in prior years defendant had a large and lucrative practice but that in recent years his practice had declined; that his gross income from his profession for 1937 was \$14,858.32; that his expenses chargeable against that income amounted to \$7,803.40, leaving a net amount of \$7,054.92; that his net income for that year was \$7,457.92; that for the year 1938 the cash received for services in his profession was \$13,763.00 and that his operating expenses were \$6,659.63, leaving a profit from his practice of \$7,103.37; that there were other expenses and some slight income which after an adjustment left his net income for 1938 at \$6,905.06; that a son, Richard, was in college and it was necessary for defendant to contribute \$100 per month for his education, support, clothes, etc.; that the son, at the time of the contract, had graduated from college; that two years previously defendant had refurnished and re-equipped his office; that he had been paying off certain amounts for such equipment; that the indebtedness incurred for the equipment would be discontinued in the near future; that because of the decline in his income and his expenses, he had incurred obligations of \$2,500; that he had been compelled to go through bankruptcy; that his net operating income for the first five months of 1939 was \$2,162.41; that he was then carrying insurance on his life in favor of plaintiff in the gross amount of \$20,000; that there were loans made against two of the policies in the amounts of \$400 and \$839, respectively; that he had no other property or earnings; that relying on such representations plaintiff was willing to accept "an amount as alimony which will barely pay her living expenses and will not provide any amount or amounts for emergencies, in order for the second party [defendant] to pay off his obligations and expects, and it is agreed that when and if the second party is able to do so, he will voluntarily increase the amount hereinafter set forth conditioned upon such improvement". The operative part of the agreement provided that defendant should pay \$55 per week as alimony;

July 28, 1939, which the court declared was fair and equitable. The principle of the contract rested that in prior years defendant had a large and lucrative practice but that in recent years his practice had declined; that his gross income from his profession for 1937 was \$14,852.26; that his expenses chargeable against that income amounted to \$7,803.40, leaving a net amount of \$7,048.86; that his net income for that year was \$7,487.92; that for the year 1938 the cash received for services in his profession was \$12,783.00 and that his operating expenses were \$6,859.65, leaving a profit from his practice of \$5,923.35; that there were other expenses and some slight income which after an adjustment left his net income for 1938 at \$5,903.08; that a son, Richard, was in college and it was necessary for defendant to contribute \$100 per month for his education, support, clothes, etc.; that the son, at the time of the contract, had graduated from college; that two years previously defendant had relinquished and re-eduigated his office; that he had been paying off certain amounts for such equipment; that the indebtedness incurred for the equipment would be discontinued in the near future; that because of the decline in his income and his expenses, he had incurred obligations of \$2,500; that he had been compelled to go through bankruptcy; that his net operating income for the first five months of 1939 was \$2,162.41; that he was then carrying insurance on his life in favor of plaintiff in the gross amount of \$20,000; that there were loans made against two of the policies in the amounts of \$400 and \$329, respectively; that he had no other property or earnings; that relying on such representations plaintiff was willing to accept "an amount as alimony which will barely pay her living expenses and will not provide any amount or amount for emergencies, in order for the second party [defendant] to pay off his obligations and execute, and it is agreed that when and if the second party is able to do so, he will voluntarily increase the amount hereinafter set forth conditioned upon such improvement". The operative part of the agreement provided that defendant should pay \$50 per week as alimony;



that he would transfer all interest in two life insurance policies in the total amount of \$15,000; that plaintiff should have full control of the policies, including the cash surrender value, and would be responsible for payment of the premiums, but that she would have the right to discontinue the policies. The household furniture and fixtures were to remain the property of plaintiff and defendant was to pay her attorney's fees. The agreement further stated: "The foregoing amounts shall be, and are hereby declared to be by the parties, the minimum amount which first party [plaintiff] shall receive; but it is agreed that in the event the second party shall improve and increase his practice or otherwise secure a more substantial income than as aforesaid; that said monthly payments shall be increased a fair and proportionate amount and if the parties hereto cannot agree upon such increase then the same shall be subject to the approval of any court which may have jurisdiction."

In dismissing defendant's first petition to reduce the alimony (March 3, 1941) the Chancellor found that the net income of the defendant from his profession in 1937 was \$7054.92; in 1938, \$6,905.06; in 1939, \$6,223.27; and in 1940, \$6,107.17. The Chancellor then found that the difference in the net incomes of 1939 and 1940 was \$116. It was because of the finding of such a slight difference in the net earnings of defendant for the year when the decree was entered and the period approximately one year later when he sought a reduction, that the court declined to grant his request. The income defendant has received as a Commander in the United States Navy commencing with June, 1942 was \$509.42 per month, or a yearly income of \$6,113.04. The Special Commissioner found that the defendant's monthly expenses at the time of the hearing were: Rent \$47.50; gas and light \$10.00; food \$60.00; transportation \$22.50; income tax for 1941 \$30.00; insurance policy \$24.00; uniforms \$25.00; professional societies \$10.00; lunch and entertainment of medical officers \$35.00; deduction from

lunch and entertainment of medical officers \$35.00; deduction from insurance policy \$24.00; uniforms \$25.00; professional societies 10.00; food \$60.00; transportation \$25.00; income tax for 1941 \$30.00; at the time of the hearing were: Rent \$47.50; gas and light \$10.00; The Special Commissioner found that the defendant's monthly expenses June, 1942 was \$59.42 per month, or a yearly income of \$,113.04. has received as a Commander in the United States Navy so moneys with that the court declined to grant his request. The income defendant and the period approximately one year later when he sought a reduction the net earnings of defendant for the year when the decree was entered \$116. It was because of the finding of such a slight difference in then found that the difference in the net incomes of 1939 and 1940 was \$6,905.02; in 1939, \$8,235.27; and in 1940, \$8,107.17. The Chancellor the defendant from his profession in 1937 was \$7054.92; in 1938, alimony (March 2, 1941) the Chancellor found that the net income of In dismissing defendant's first petition to reduce the to the approval of any court which may have jurisdiction."

be increased a fair and proportionate amount and at the parties estate income than as aforesaid; that said monthly payments shall improve and increase his practice or otherwise secure a more sub- receive; but it is agreed that in the event the second party shall parties, the minimum amount which first party [plaintiff] shall foregoing amounts shall be, and are hereby declared to be by the was to pay her attorney's fees. The agreement further stated: "The and fixtures were to remain the property of plaintiff and defendant have the right to discontinue the policies. The household furniture would be responsible for payment of the premiums, but that she would control of the policies, including the cash surrender value, and in the total amount of \$15,000; that plaintiff should have full that he would transfer all interest in two life insurance policies



monthly salary for Government insurance \$28.28; cleaning and laundry \$25.00; medical books and periodicals \$5.00; due to H. N. Haberstroh \$1,000 on an original loan of \$1,500, being repaid at the rate of \$50 per month; due to John B. LaDue \$150, not being repaid in any particular manner or amount; due to Arthur Goldblatt, attorney for defendant, \$250 for attorney's fees, to be paid at the rate of \$50 per month. Plaintiff testified that she maintained a four room apartment at 1632 East 54th Street, Chicago; that her daughter Patricia, lived with her; that her daughter was a school teacher; that the daughter did not pay plaintiff for her board and room, but purchased whatever clothes plaintiff required; that her daughter earned \$90 a month as a school teacher in Flossmoor and would teach in the following year in Homewood; that these are County public schools and that her daughter must pay train fare in order to ride back and forth. Plaintiff further testified that she paid \$60 a month for her apartment; that her weekly budget was allocated to \$15 for rent, \$10 for insurance, including interest on defendant's loan on one policy, \$15 for food and incidental expenses, \$10 for utilities, including laundry, church, medicine, doctor and dentist, leaving \$5 for emergency use. She had lived in much better fashion when rearing her children. They had paid \$208 rent at one time. At the time of the hearing plaintiff was 59½ years old and had never had any business experience. She testified that she was not capable of doing anything to make a living and that she was "none too strong". There was testimony that defendant had remarried. Plaintiff offered to produce proof that the second Mrs. Molt had an income in excess of \$200 per month. The Special Commissioner found that even though the second wife "may have an independent income she is under no legal obligation to help support the plaintiff herein and that almost all of the expense which defendant incurs each month would exist regardless of whether or not he was married to said second wife". The daughter testified as to her income. She pays for her own lunches, railroad fare to school, clothes and all incidental expenses and does not have much left at the end of the month.

monthly salary for Government insurance \$8.32; cleaning and laundry \$2.00; radio books and periodicals \$5.00; due to R. M. Haberstrom \$1,000 on an original loan of \$1,500, being repaid at the rate of \$50 per month; due to John B. Labue \$50, not being repaid in any particular manner or amount; due to Arthur Goldblatt, attorney for defendant, \$250 for attorney's fees, to be paid at the rate of \$50 per month. Plaintiff testified that she maintained a four room apartment at 1832 East 54th Street, Chicago; that her daughter Patricia, lived with her; that her daughter was a school teacher; that the daughter did not pay plaintiff for her board and room, but purchased whatever clothes plaintiff required; that her daughter earned \$90 a month as a school teacher in Bloomer and would teach in the following year in Homewood; that there are County Public schools and that her daughter must pay train fare in order to ride back and forth. Plaintiff further testified that she paid \$8 a month for her apartment; that her weekly budget was allocated to \$15 for rent, \$10 for insurance, including interest on defendant's loan on one policy, \$5 for food and incidental expenses, \$10 for utilities, including laundry, church, medicine, doctor and dentist, leaving \$5 for emergency use. She had lived in much better fashion when rearing her children. They had paid \$208 rent at one time. At the time of the hearing plaintiff was 52½ years old and had never had any business experience. She testified that she was not capable of doing anything to make a living and that she was "none too strong". There was testimony that defendant had remarried. Plaintiff offered to produce proof that the second Mrs. Wolf had an income in excess of \$200 per month. The Special Commissioner found that even though the second wife "may have an independent income she is under no legal obligation to help support the plaintiff herein and that almost all of the expenses which defendant incurs each month would exist regardless of whether or not he was married to said second wife". The defendant testified as to her income. She pays for her own lunches, railroad



Sec. 19, Ch. 40, Ill. Rev. Stat. 1941, (Sec. 18 of the Divorce Act) provides that subsequent to the entry of a decree the court may, on application, from time to time, make such alteration in the allowance of alimony as shall appear reasonable and proper. It is a settled law that the decree is conclusive of the amount of alimony as of conditions as they exist at the time of the decree. Alimony allowances in decrees, even though based upon agreement of the parties, may be modified because of a material change of conditions. The question presented by the record is whether there has been a material change in the income and living conditions of the parties. In the order entered on March 3, 1941 the Chancellor declined to modify the decree, holding in effect that there was no material change. Since then defendant entered the service of the United States Navy. At the time of the present hearing he was receiving a yearly income of \$6,113.04. At the previous hearing, as a result of which his petition for a reduction was denied, the court found his income to be \$6,107.17, or \$5.87 less than his annual income during the year when the original decree was entered. It will be observed that no appeal was taken from the previous order denying the petition to reduce the alimony. Most of the expense which Commander Molt was under at the time of the instant hearing, such as rent, food clothes and the like was, prior to entry on active service in the Navy, paid out of the net income from his practice. There is no substantial difference between the net income defendant was receiving at the time of the hearing in the instant case and his net income the year the decree was entered. The burden was on defendant to establish by a preponderance of the evidence that there was a material change in the income and living conditions of the parties, and he did not sustain this burden. There was no justification for the recommendation of the Special Commissioner and the court was in error in entering the order reducing the alimony and in declining to vacate such order. Because of the views expressed the orders of the Circuit Court of Cook County

Sec. 18, Ch. 40, Ill. Civ. Stat. 1941, (Sec. 18 of the

Divorce Act) provides that subsequent to the entry of a decree the court may, on application, from time to time, make such alteration in the allowance of alimony as shall appear reasonable and proper. It is a settled law that the decree is conclusive of the amount of alimony as of conditions as they exist at the time of the decree. Alimony allowances in decrees, even though based upon a statement of the parties, may be modified because of a material change of conditions. The question presented by the record is whether there has been a material change in the income and living conditions of the parties. In the order entered on March 5, 1941 the Chancellor declined to modify the decree, holding in effect that there was no material change. Since then defendant entered the service of the United States Navy. At the time of the present hearing he was receiving a yearly income of \$113.04. At the previous hearing, as a result of which his petition for a reduction was denied, the court found his income to be \$6107.17, or \$527 less than his annual income during the year when the original decree was entered. It will be observed that no appeal was taken from the previous order denying the petition to reduce the alimony. Most of the expense which Commander Wolf was under at the time of the instant hearing, such as rent, food clothes and the like was, prior to entry on active service in the Navy, paid out of the net income from his practice. There is no substantial difference between the net income defendant was receiving at the time of the hearing in the instant case and his net income the year the decree was entered. The burden was on defendant to establish by a preponderance of the evidence that there was a material change in the income and living conditions of the parties, and he did not sustain this burden. There was no justification for the recommendation of the Special Commissioner and the court was in error in entering the order reducing the alimony and in declining to vacate such order. Because of the views expressed the orders of the Circuit Court of Cook County

of July 10, 1942 and July 30, 1942 are vacated and the cause remanded with directions to enter an order dismissing defendant's petition for reduction of alimony for want of equity, and awarding plaintiff a reasonable amount for attorney's fees and other incidental expenses incurred by her in the proceeding and in prosecuting her appeal,

ORDERS REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

HEBEL AND KILEY, JJ. CONCUR.



of July 10, 1942 and July 30, 1942 are vacated and the cause remanded with directions to enter an order dismissing defendant's petition for reduction of alimony for want of equity, and awarding plaintiff a reasonable amount for attorney's fees and other incidental expenses incurred by her in the proceeding and in prosecuting her appeal.

ORDERS REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

HEBER AND KILBY, JJ. CONCUR.

42540

320 I.A. 134

GEORGE A. KAWKES, Administrator of  
the Estate of Peter Zapantis, Deceased,

APPEAL FROM

Plaintiff - Appellant,

v.

SUPERIOR COURT

RICHTER'S FOOD PRODUCTS, INCORPORATED,  
a Corporation, and JOSEPH WEKONY,

COOK COUNTY.

Defendants - Appellees.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

George A. Kawkes, administrator of the estate of Peter Zapantis, deceased, filed a complaint at law in the Superior Court of Cook County against Richter's Food Products, Inc., a corporation, and Joseph Wekony, charging that the deceased died on June 2, 1940 as the proximate result of injuries received on May 16, 1940, because of the negligence of defendants, and asked damages in the sum of \$10,000. Issue was joined and the case was tried before the court and a jury, resulting in a verdict of not guilty. Plaintiff's motion for a new trial was overruled and judgment for costs was entered on the verdict in favor of both defendants and against plaintiff. This appeal followed. Plaintiff urges that the verdict and judgment are against the manifest weight of the evidence, and the defendants insist that the verdict and judgment are in accord with the evidence.

Peter Zapantis was a priest of the Greek Orthodox Church. He was 65 years old. The fatal accident occurred on Thursday, May 16, 1940, at about 3:00 p.m. at the intersection of Randolph and Halsted Streets, Chicago. Randolph Street runs in an easterly and westerly direction and Halsted Street in a northerly and southerly direction. There are two sets of street car tracks on each street.

GEORGE A. KARKAS, Administrator of  
the Estate of Peter Zapanitis, Deceased,

Plaintiff - Appellant,

v.

RIGHTER'S FOOD PRODUCTS, INCORPORATED,  
a Corporation, and JOSEPH WERNOW,

Defendants - Appellees.

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of Cook County against Righter's Food Products, Inc., a corporation,

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sum of 10,000. Issue was joined and the case was tried before

the court and a jury, resulting in a verdict of not guilty. Plaintiff's

motion for a new trial was overruled and judgment for costs was

entered on the verdict in favor of both defendants and against

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Peter Zapanitis was a priest of the Greek Orthodox Church.

He was 65 years old. The fatal accident occurred on Thursday, May

18, 1940, at about 3:00 p.m. at the intersection of Randolph and

Halsted Streets, Chicago. Randolph Street runs in an easterly and

westerly direction and Halsted Street in a northerly and southerly

direction. There are two sets of street car tracks on each street.



Randolph Street, to the west of Halsted Street, is approximately 120 feet wide from curb to curb. East of Halsted Street, Randolph Street narrows to the width of an ordinary street. Halsted Street has a normal width. The streets form a right angle intersection. At the northeast corner there is a small restaurant and tavern. On the southeast corner there is a well known restaurant. On the north side of Randolph Street and running in a westerly direction from Halsted Street are wholesale and retail stores. On the southwest corner there is a package liquor store and on the south side of the street running in a westerly direction there are wholesale and retail stores. South of the street car tracks, which are near the center of the street, the street is marked off so as to afford parking space for produce trucks and these trucks are permitted to park next to the tracks as well as to the south curb. To the west of the west crosswalk, a distance of about 60 feet, and to the south of the street car tracks is a "No Parking" zone, where cars are not supposed to park. However, cars are frequently parked in this zone and at the time of the occurrence there were cars parked in this zone up to the crosswalk. There are no traffic signal lights at this intersection. Similar lines to show where cars are permitted to park are marked out north of the west bound street car tracks. The defendant Joseph Wekony, an employee of the corporate defendant, was driving his employer's truck east on Randolph Street approaching Halsted Street along the eastbound car tracks. The right wheels of the truck were about six inches to the south of the south rail of the eastbound tracks. The truck was a Ford with a refrigerator body. At approximately the same time Rev. Zapantis was walking north on the west crosswalk approaching the eastbound car tracks. The testimony introduced on behalf of plaintiff tended to show that the truck struck Rev. Zapantis and knocked him down. Evidence produced by defendants tended to show that he walked into the side of the truck at a point back of the cab.

Randolph Street, to the west of Halsted Street, is approximately 120 feet wide from curb to curb. East of Halsted Street, Randolph Street narrows to the width of an ordinary street. Halsted Street has a normal width. The streets form a right angle intersection. At the northeast corner there is a small restaurant and tavern. On the southeast corner there is a well known restaurant. On the north side of Randolph Street and running in a westerly direction from Halsted Street are wholesale and retail stores. On the southwest corner there is a package liquor store and on the south side of the street running in a westerly direction there are wholesale and retail stores. South of the street car tracks, which are near the center of the street, the street is marked off so as to afford parking space for produce trucks and these trucks are permitted to park next to the tracks as well as to the south curb. To the west of the west crosswalk, a distance of about 50 feet, and to the south of the street car tracks is a "No Parking" zone, where cars are not supposed to park. However, cars are frequently parked in this zone and at the time of the occurrence there were cars parked in this zone up to the crosswalk. There are no traffic signal lights at this intersection. Similar lines to show where cars are permitted to park are marked out north of the west bound street car tracks. The defendant Joseph Wokony, an employee of the corporate defendant, was driving his employer's truck east on Randolph Street approaching Halsted Street along the eastbound car tracks. The right wheels of the truck were about six inches to the south of the south rail of the eastbound tracks. The truck was a Ford with a refrigerator body. At approximately the same time Rev. Canalis was walking north on the west crosswalk approaching the eastbound car tracks. The testimony introduced on behalf of plaintiff tended to show that the truck struck Rev. Canalis and knocked him down. Evidence produced by defendant tended to show that he walked into the side of the truck at a point back of the cab.



Edward J. Robe, called by plaintiff, testified that he was a machinery dealer; that the parties were unknown to him; that just prior to the accident he was walking south on the east side of Halsted Street preparing to board a Randolph Street car going west; that he saw the deceased and also saw the truck of defendant just before the accident happened; that when he first saw the deceased, he (deceased) was walking north on the west side of Halsted Street; that the deceased was on the crosswalk and at that time was probably 10 feet from the street car track. When the witness first saw the automobile it was about 50 or 60 feet west of the crosswalk. He testified that he could observe with an unobstructed view that defendant's automobile was traveling 30 or 35 miles an hour. Witness further testified that when deceased reached the street car track, the truck struck him and knocked him down. Witness thought that the truck was going at the same speed from the time when he first saw it until it hit deceased, and that after deceased was struck he (deceased) was lying on the south side of the street car track on the crosswalk. Witness stated that defendant's truck did not stop until after it had crossed Halsted Street; that in fact it did not stop until about 20 feet east of the east crosswalk. Halsted Street at that point is from 50 to 60 feet wide. Witness did not hear any horn or other warning signal given by the driver. The name of this witness was taken by a police officer who appeared on the scene shortly after the accident. Witness further testified that he had to yell to the driver of the truck before the driver stopped the truck and that then witness and the driver walked back to the point where the body of the deceased was lying. At the request of the police, witness went to the police station with the driver of the truck. He also testified at the inquest. Witness further stated that he did not see any traffic moving east or west on Randolph Street at the time of the accident.

Edward J. Pope, called by Plaintiff, testified that he was a machinery dealer; that the parties were unknown to him; that just prior to the accident he was walking north on the west side of Halsted Street preparing to board a Randolph Street car going west; that he saw the deceased and also saw the truck of defendant just before the accident happened; that when he first saw the deceased, he (deceased) was walking north on the west side of Halsted Street; that the deceased was on the crosswalk and at that time was probably 10 feet from the street car track. When the witness first saw the automobile it was about 50 or 60 feet west of the crosswalk. He testified that he could observe with an unobstructed view that defendant's automobile was traveling 50 or 55 miles an hour. Witness further testified that when deceased reached the street car track, the truck struck him and knocked him down. Witness thought that the truck was going at the same speed from the time when he first saw it until it hit deceased, and that after deceased was struck he (deceased) was lying on the south side of the street car track on the crosswalk. Witness stated that defendant's truck did not stop until after it had crossed Halsted Street; that in fact it did not stop until about 20 feet east of the east crosswalk. Halsted Street at that point is from 50 to 60 feet wide. Witness did not hear any horn or other warning signal given by the driver. The name of this witness was taken by a police officer who appeared on the scene shortly after the accident. Witness further testified that he had to yell to the driver of the truck before the driver stopped the truck and that then witness and the driver walked back to the point where the body of the deceased was lying. At the request of the police, witness went to the police station with the driver of the truck. He also testified at the request. Witness further stated that he did not see any traffic moving east or west on Randolph Street at the time of the accident.



Malcolm Schreiber, a police officer, testified that he did not witness the accident; that at that time he was about 300 feet north of Randolph Street; that he heard screaming and saw a crowd congregating; that when he arrived he saw deceased lying in the crosswalk about two feet north of the south rail of the eastbound car track; that on inquiry he learned that defendant's truck, which was then parked on the southeast corner of Halsted and Randolph Streets, approximately 80 feet from where the body was lying, had struck the man. The officer talked to the driver of the truck and then called for a patrol car. He made a note of the name of the truck driver and also took the name of Mr. Robe as a witness. The officer did not take the name of Lillian Margaret Fuller, who testified for defendant. He stated that she was not there.

The defendant Wekony, called under Section 60 of the Civil Practice Act, testified that his truck was traveling on the right hand side, that is, right where the street car travels; that he drove ahead at about 15 miles an hour, and as he approached Halsted Street he slowed up. He further testified that "when I slowed up I would say that I was about 25 feet from Halsted Street if you mean the center of the street. Halsted Street is a busy street. I did not see the man at any time before this thing happened. The fellow was so short I couldn't see him because he walked between the cars and I couldn't see him at all. I didn't hit the man. If he came in contact with the truck that was behind the cab and I couldn't say what happened after that. Before the man came in contact with the truck I maybe got just a glimpse of him as I was swinging out of the way to get away from him. When I first saw him I had just enough time to get my foot off the gas pedal and step on the brake. I would say about 10 feet from the crosswalk when I first saw him".

Defendants introduced Michael Regan, a police officer attached to the Accident Prevention Bureau. He did not see the accident. He testified about the width of the streets and the result of his investigation at the scene of the accident. Joseph P. Piotrowski,

Malcolm Schneider, a police officer, testified that he did

not witness the accident; that at that time he was about 300 feet

north of Randolph Street; that he heard screaming and saw a crowd

congregating; that when he arrived he saw deceased lying in the

crosswalk about two feet north of the south rail of the eastbound

car track; that on inquiry he learned that defendant's truck, which

was then parked on the southeast corner of Halsted and Randolph

Streets, approximately 80 feet from where the body was lying, had

struck the man. The officer talked to the driver of the truck and

then called for a patrol car. He made a note of the name of the truck

driver and also took the name of Mr. Robs as a witness. The officer

did not take the name of William Margaret Fuller, who testified for

defendant. He stated that she was not there.

The defendant, known, called under Section 60 of the Civil

Practice Act, testified that his truck was traveling on the right hand

side, that is, right where the street car travels; that he drove

ahead at about 15 miles an hour, and as he approached Halsted Street

he slowed up. He further testified that "when I slowed up I would

say that I was about 25 feet from Halsted Street if you mean the

center of the street. Halsted Street is a busy street. I did not

see the man at any time before this thing happened. The fellow was

so short I couldn't see him because he walked between the cars and I

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with the truck that was behind the cab and I couldn't say what happened

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Defendants introduced Michael Regan, a police officer attached

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another police officer attached to the Accident Prevention Bureau, testified as to an investigation made following the accident.

A deposition given by Lillian Margaret Fuller was read to the jury. She testified that at the time of the accident she was a bookkeeper employed by the corporate defendant; that at the time the deposition was taken she was not employed by the corporate defendant; that in the meantime she had married; that at the time the deposition was taken her husband was in the employ of the corporate defendant; that she was riding on the truck at the time of the accident; that when she first saw the deceased he was coming out from between some parked cars; that he was at least five car lengths back from the crosswalk; that he walked into the box part of the truck, which was that portion of the truck behind the driver's cab. She further testified that when she first saw the deceased the driver of the truck in which she was riding swerved the truck to the left and made a sharp turn; that the driver stopped his truck and got out; that he went around the back of the truck; that a policeman came over and directed that the truck be pulled across the street; that the driver did so and parked it on the east side of the street; that she remained on the truck about five minutes; that she then got off the truck and stood on the corner; that the driver of the truck then went across to where the man who was struck was lying; that the man was taken over to the curb; that she remained there from 20 to 25 minutes; that she did not walk over to where the driver was; that eventually she boarded an eastbound street car and went downtown.

Norman C. Coughlin, called by defendants, testified that at the time of the accident he was driving an automobile north on Halsted street; that at that time he had pulled into Halsted Street about 40 feet; that trucks were parked on the west side of Randolph Street to within three or four feet of the crosswalk; that the truck being driven by Wekony was proceeding east in the car tracks; that when he first saw deceased he was about three-quarters of a car length from

another police officer attached to the Accident Prevention Bureau,

testified as to an investigation made following the accident.

A deposition given by William Margaret Butler was read to

the jury. She testified that at the time of the accident she was a

bookkeeper employed by the corporate defendant; that at the time the

deposition was taken she was not employed by the corporate defendant;

that in the meantime she had married; that at the time the deposition

was taken her husband was in the employ of the corporate defendant; that

she was riding on the truck at the time of the accident; that when she

first saw the deceased he was coming out from between some parked cars;

that he was at least five car lengths back from the crosswalk; that he

walked into the box part of the truck, which was that portion of the

truck behind the driver's cab. She further testified that when she first

saw the deceased the driver of the truck in which she was riding answered

the truck to the left and made a sharp turn; that the driver stopped

his truck and got out; that he went around the back of the truck; that

a policeman came over and directed that the truck be pulled across the

street; that the driver did so and parked it on the east side of the

street; that she remained on the truck about five minutes; that she

then got off the truck and stood on the corner; that the driver of the

truck then went across to where the man who was struck was lying; that

the man was taken over to the curb; that she remained there from 20 to

25 minutes; that she did not walk over to where the driver was; that

eventually she boarded an eastbound street car and went downtown.

Norman G. Goughlin, called by defendant, testified that at

the time of the accident he was driving an automobile north on Halsted

street; that at that time he had pulled into Halsted street about 40

feet; that trucks were parked on the west side of Randolph street to

within three or four feet of the crosswalk; that the truck being

driven by Wokany was proceeding east in the car tracks; that when he

first saw deceased he was about three-quarters of a car length from



the eastbound street car tracks; that deceased was walking north; that when he first saw the truck it was 60 to 80 feet west of Halsted Street; that as he observed the truck approaching at a distance of from 25 to 40 feet west of the crosswalk, it was proceeding at a speed of approximately 20 miles an hour; that deceased stopped, looking up at witness's car; that then deceased, without turning his head or looking back, and still watching witness's car, proceeded north and walked into the side of the truck; that deceased was struck by the box that stood out in back of the cab; that deceased spun around three or four times and was thrown several feet east where he lay; that he did not know whether the truck changed its direction before the contact; that the truck then proceeded across Halsted Street in front of witness's car; that the witness parked his car about a block away and came back intending to assist the man who had been struck, and that in the meantime others were assisting him. Witness could not say whether the driver stopped his truck immediately after striking the deceased. Witness did not give his name to the policeman. He did not know the driver before the accident. He testified further that about a week after the accident he was driving his car at Foster and Kedzie Avenues, about ten miles from the scene of the accident; that he observed the driver of the truck involved in the accident; that he pulled up alongside of him and inquired about the accident. Witness also testified that at the time of the accident there was no other traffic going north or south on Halsted Street.

Plaintiff states that it appears from the evidence and without question that deceased was a pedestrian rightfully crossing an intersection; that he was in the exercise of ordinary care for his own safety; that the driver of the truck, by his own admission, came within 25 to 50 feet of a busy intersection and struck the deceased without giving any warning of the approach of his truck; that he struck the deceased without seeing him before he was struck; that he

the eastbound street car track; that deceased was walking north; that when he first saw the truck it was 50 to 60 feet west of Haled Street; that as he observed the truck approaching at a distance of from 25 to 40 feet west of the crosswalk, it was proceeding at a speed of approximately 20 miles an hour; that deceased stopped, looking up at witness's car; that then deceased, without turning his head or looking back, and still watching witness's car, proceeded north and walked into the side of the truck; that deceased was struck by the box that stood out in back of the cab; that deceased went around three or four times and was thrown several feet east where he lay; that he did not know whether the truck changed its direction before the contact; that the truck then proceeded across Haled Street in front of witness's car; that the witness parked his car about a block away and came back intending to assist the man who had been struck, and that in the meantime others were assisting him. Witness could not say whether the driver stopped his truck immediately after striking the deceased. Witness did not give his name to the policeman. He did not know the driver before the accident. He testified further that about a week after the accident he was driving his car at Fort and Regale avenues, about ten miles from the scene of the accident; that he observed the driver of the truck involved in the accident; that he pulled up alongside of him and inquired about the accident. Witness also testified that at the time of the accident there was no other traffic going north or south on Haled Street. Plaintiff states that it appears from the evidence and without question that deceased was a pedestrian rightfully crossing an intersection; that he was in the exercise of ordinary care for his own safety; that the driver of the truck, by his own negligence, caused within 25 to 30 feet of a busy intersection and struck the deceased without giving any warning of the approach of his truck; that he struck the deceased without seeing him before he was struck; that he



then proceeded on across Halsted Street for a distance of 80 feet without knowing he had struck or injured anyone until the witness Robe called to him to stop his truck, and that as a result of the truck striking him the deceased became unconscious and died. Plaintiff states that these facts spell negligence, asserts that Robe was a disinterested witness but that the defendant Wekony and the witness Fuller were not disinterested, and that witness Coughlin merely "dropped from a very dark and very questionable cloud". Outside of the individual defendant who was called under Section 60 of the Civil Practice Act, Mr. Robe was the only occurrence witness called by plaintiff. Defendants relied upon the testimony of Wekony and two other witnesses, namely Fuller and Coughlin. It is apparent that the testimony of Robe was contradicted on practically every material fact to which he testified. The testimony of Wekony is corroborated by Coughlin and Fuller. Robe testified that the truck struck the deceased and knocked him down, while witnesses Wekony, Fuller and Coughlin testified that the deceased walked into the side of the truck. Witnesses Wekony and Fuller testified that immediately after the impact the driver brought the truck to a stop and that he did not cross the street until after he had been told to do so by a police officer. There was testimony that cars were parked in the "no parking" zone and that these cars were parked up to the sidewalk on which deceased was proceeding. In discussing the testimony of witness Fuller, plaintiff calls attention to her statement that she remained on the truck for a few minutes, then stood on the corner for 25 minutes without talking to anyone, not even the driver, and that she then took a street car and went on downtown. Plaintiff argues that this conduct is contrary to what is usually termed "feminine curiosity". Plaintiff also criticizes the testimony of witness Coughlin, pointing out that this witness did not give his name to the police officer, but that a few days after the accident he saw the truck driver at a place several miles distant from the scene of the accident, spoke to the driver and gave him his name and address as a witness. There is no



then proceeded on across Market Street for a distance of 80 feet without knowing he had struck or injured anyone until the witness Robe called to him to stop his truck, and that as a result of the truck striking him the deceased became unconscious and died. Plaintiff states that these facts speak well for the testimony of Robe was a disinterested witness but that the defendant Wekory and the witness Kuller were not disinterested, and that witness Goughlin merely "dropped from a very dark and very questionable cloud". Outside of the individual defendant who was called under Section 60 of the Civil Practice Act, Mr. Robe was the only occurrence witness called by plaintiff. Defendants relied upon the testimony of Wekory and two other witnesses, namely Kuller and Goughlin. It is apparent that the testimony of Robe was contradicted on practically every material fact to which he testified. The testimony of Wekory is corroborated by Goughlin and Kuller. Robe testified that the truck struck the deceased and knocked him down, while witnesses Wekory, Kuller and Goughlin testified that the deceased walked into the side of the truck. Witnesses Wekory and Kuller testified that immediately after the impact the driver brought the truck to a stop and that he did not cross the street until after he had been told to do so by a police officer. There was testimony that cars were parked in the "no parking" zone and that these cars were parked up to the sidewalk on which deceased was proceeding. In discussing the testimony of witness Kuller, plaintiff calls attention to her statement that she remained on the truck for a few minutes, then stood on the corner for 25 minutes without talking to anyone, not even the driver, and that she then took a street car and went on downtown. Plaintiff argues that this conduct is contrary to what is usually termed "feminine courtesy". Plaintiff also criticizes the testimony of witness Goughlin, pointing out that this witness did not give his name to the police officer, but that a few days after the accident he saw the truck driver at a place several miles distant from the scene of the accident, spoke to the driver and gave him his name and address as a witness. There is no

dispute that deceased had a right to walk along the crosswalk. Deceased, however, was required to exercise ordinary care. There was proof that as he walked north along the crosswalk at a point where cars were parked, he was looking in an easterly or southeasterly direction or the opposite direction from which the eastbound traffic was coming and walked into the side of the truck. In our opinion the case presented a question of fact for the jury. The jurors saw and heard the witnesses, except Lillian Fuller, whose deposition was read to them. We notice that nine of the twelve jurors were women. They were in a better position than this court to determine whether the testimony of Lillian Fuller that she observed the occurrence but did not disclose her presence, was the normal reaction of a woman under such circumstances. We are of the opinion that the trial judge was correct in deciding that the verdict was not contrary to the manifest weight of the evidence.

Plaintiff maintains that the court erred in refusing to admit certain proffered testimony as to the transmittal by deceased of funds to his family in Greece. The evidence shows that deceased was 65 years of age; that he left his family in Greece about 25 years previously; that he had not returned to pay them a visit; that on the day of the occurrence Reverend Zapantis had sent \$40 to his wife in Greece; that he had five children, the youngest child being 25 years of age; and that two of the children resided in this country. The administrator, who is a son-in-law of deceased, testified that while the deceased was in the hospital he gave him (plaintiff) \$100 to send to his wife in Greece, and that witness sent the \$100 to the widow on June 8, 1940, which was six days after the death of the deceased. The court held that evidence as to the \$100 item was incompetent. Defendants contend that there was no error in this ruling. The trial judge was of the opinion that the death of Reverend Zapantis terminated the authority of his son-in-law to transfer the funds. Defendants argue that the sum of \$100 was a gift which could be revoked before actual delivery and that the agency of the son-in-law



dispute that deceased had a right to walk along the crosswalk. Deceased, however, was required to exercise ordinary care. There was proof that as he walked north along the crosswalk at a point where cars were parked, he was looking in an easterly or southeasterly direction or the opposite direction from which the eastbound traffic was coming and walked into the side of the truck. In our opinion the case presented a question of fact for the jury. The jurors saw and heard the witnesses, except Lillian Fuller, whose deposition was read to them. We notice that nine of the twelve jurors were women. They were in a better position than this court to determine whether the testimony of Lillian Fuller that she observed the occurrence but did not disclose her presence, was the normal reaction of a woman under such circumstances. We are of the opinion that the trial judge was correct in deciding that the verdict was not contrary to the manifest weight of the evidence.

Plaintiff maintains that the court erred in refusing to admit certain proffered testimony as to the transmission by deceased of funds to his family in Greece. The evidence shows that deceased was 65 years of age; that he left his family in Greece about 25 years previously; that he had not returned to pay them a visit; that on the day of the occurrence Reverend Agapitis had sent 40 to his wife in Greece; that he had five children, the youngest child being 25 years of age; and that two of the children resided in this country. The administrator, who is a son-in-law of deceased, testified that while the deceased was in the hospital he gave him (plaintiff) 100 to send to his wife in Greece, and that witness sent the 100 to the widow on June 9, 1940, which was six days after the death of the deceased. The court held that evidence as to the 100 item was incompetent. Defendants contend that there was no error in this ruling. The trial judge was of the opinion that the death of Reverend Agapitis terminated the authority of his son-in-law to transfer the funds. Defendants argue that the sum of 100 was a gift which could be revoked before actual delivery and that the agency of the son-in-law



was revoked on the death of deceased. While this is true as an abstract proposition of law, we are of the opinion that the evidence as to the delivery of the \$100 to the son-in-law, with instructions to send it to deceased's wife in Greece, was admissible, as it showed the intention of deceased to contribute to the support of his wife. The parties are in agreement that the law presumes some substantial damages where the next of kin of deceased are lineal and not collateral, from the fact of the relationship alone. There was evidence that the deceased sent money to his wife. In this case the fact that the court struck the evidence concerning the \$100 did not harm the plaintiff. It is apparent that the jury found against plaintiff on the proposition of liability and it was not necessary to consider the matter of damages.

Plaintiff insists that the court erred in permitting improper conduct on the part of defendants' counsel in the trial of the case and in the argument to the jury, and that as a consequence the verdict was the result of passion and prejudice. We have examined the record and are of the opinion that counsel for defendants was not guilty of improper conduct on the trial or in his argument. Finally, plaintiff complains of the action of the court in giving instruction No. 19 at the instance of defendants, as follows:

"If, after you have considered all the evidence and applied the instructions of the court to the law, you find that the defendants are liable, then you will be required to consider what damages, if any, the next of kin have sustained by reason of the death. In determining the amount of damages, if any, you must be governed solely by the actual pecuniary or money loss, if any, as shown by the evidence, that the next of kin have sustained by reason of the death. You cannot allow any damages for sorrow, bereavement or mental suffering of the next of kin of the deceased, nor any for loss of the society of the deceased."

On motion of plaintiff the court gave the following instruction:

"The court instructs the jury that if from the evidence and under the instructions of the court you find the defendants guilty as charged in the plaintiff's complaint, then in assessing the damages, if any, you have a right to take into consideration all of the testimony bearing upon that question, and allow such damages as you may deem a fair and just compensation with reference to the pecuniary injuries, if any, resulting from the death of plaintiff's intestate, to his next of kin, and in assessing the plaintiff's damages you have a right to take into consideration whatever, if anything, you may believe from the evidence his next of kin might have reasonably expected in a pecuniary way from the continued life of said deceased."

was revoked on the death of deceased. While this is true as an abstract proposition of law, we are of the opinion that the evidence as to the delivery of the \$100 to the non-law, with instructions to send it to deceased's wife in Greece, was admissible, as it showed the intention of deceased to contribute to the support of his wife. The parties are in agreement that the law presumes some substantial damages where the next of kin of deceased are living and not collaterals. From the fact of the relationship alone. There was evidence that the deceased sent money to his wife. In this case the fact that the court struck the evidence concerning the \$100 did not harm the plaintiff. It is apparent that the jury found against plaintiff on the proposition of liability and it was not necessary to consider the matter of damages. Plaintiff insists that the court erred in permitting improper conduct on the part of defendant's counsel in the trial of the case and in the argument to the jury, and that as a consequence the verdict was the result of passion and prejudice. We have examined the record and are of the opinion that counsel for defendant was not guilty of improper conduct on the trial or in his argument. Finally, plaintiff complains of the action of the court in giving instruction No. 19 at the instance of defendant, as follows:

"If, after you have considered all the evidence and applied the instructions of the court to the law, you find that the defendant are liable, then you will be required to consider what damages, if any, the next of kin have sustained by reason of the death. In determining the amount of damages, if any, you must be governed solely by the actual pecuniary or money loss, if any, as shown by the evidence, that the next of kin have sustained by reason of the death. You cannot allow any damages for sorrow, bereavement or mental suffering of the next of kin of the deceased, nor any for loss of the society of the deceased."

On motion of plaintiff the court gave the following instruction: "The court instructs the jury that if from the evidence and under the instructions of the court you find the defendant guilty as charged in the plaintiff's complaint, then in assessing the damages, if any, you have a right to take into consideration all of the testimony bearing upon that question, and allow such damages as you may deem a fair and just compensation with reference to the pecuniary injuries, if any, resulting from the death of plaintiff's intestate, to his next of kin, and in assessing the plaintiff's damages you have a right to take into consideration whatever, if anything, you may believe from the evidence his next of kin might have reasonably expected in a pecuniary way from the continued life of said deceased."



Plaintiff urges that instruction No. 19 ignores completely the presumption of pecuniary loss and fits into the argument of defendants' counsel to the jury that there was proof that deceased had not contributed more than \$40 to his family. This instruction deals solely with the matter of damages. As the jury found defendants not guilty, it was not necessary for them to consider the matter of damages. However, as to plaintiff's contention that instruction No. 19 completely ignores the presumption of pecuniary loss, we note that plaintiff's instruction on the same subject, which we have quoted, also ignores mention of any presumption of pecuniary loss. We do not approve the giving of defendants' instruction No. 19. However, under all of the circumstances of the case, we are of the opinion that the giving of this instruction was harmless. We are satisfied that the case was fairly tried and that the action of the jury in resolving the issues in favor of defendants is supported by the record. Therefore, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, J. CONCURS.

HEBEL, J. DISSENTING:

I am unable to agree with the conclusion reached by the court affirming the judgment that was entered by the trial court on the verdict of the jury which found for the defendant.

From the facts it appears that Peter Zapantis was a priest of the Greek Orthodox Church. He was 65 years old. The fatal accident occurred on Thursday, May 16, 1940, at about 3:00 o'clock P.M. at the intersection of Randolph and Halsted Streets, Chicago. There are two sets of street car tracks on each street. The streets form a right angle intersection. The Reverend Zapantis was walking north on the west side of Halsted Street and was on the crosswalk crossing Randolph Street.

There is evidence of the witness Edward J. Robe who testified that he saw the deceased and also the truck of the defendant just before the accident happened and that he saw Zapantis on the crosswalk and at



Plaintiff urges that instruction No. 18 ignores completely the presumption of pecuniary loss and fits into the argument of defendants' counsel to the jury that there was no proof that deceased had not contributed more than 40 to his family. This instruction deals solely with the matter of damages. As the jury found defendants not guilty, it was not necessary for them to consider the matter of damages. However, as to plaintiff's contention that instruction No. 18 completely ignores the presumption of pecuniary loss, we note that plaintiff's instruction on the same subject, which we have quoted, also ignores mention of any presumption of pecuniary loss. We do not approve the giving of defendants' instruction No. 18. However, under all of the circumstances of the case, we are of the opinion that the giving of this instruction was harmless. We are satisfied that the case was fairly tried and that the action of the jury in resolving the issues in favor of defendants is supported by the record. Therefore, the judgment of the Superior Court of Cook County is affirmed.

#### JUDGMENT AFFIRMED.

KILLY, J. CONCURS.

HESSL, J. DISSENTING.

I am unable to agree with the conclusion reached by the court affirming the judgment that was entered by the trial court on the verdict of the jury which found for the defendant.

From the facts it appears that Peter Kapanitis was a priest of the Greek Orthodox Church. He was 55 years old. The fatal accident occurred on Thursday, May 18, 1940, at about 3:00 o'clock P.M. at the intersection of Randolph and Halsted Streets, Chicago. There are two sets of street car tracks on each street. The streets turn a right angle intersection. The Reverend Kapanitis was walking north on the west side of Halsted Street and was on the crosswalk crossing Randolph Street. There is evidence of the witness Edward J. Koda who testified that he saw the deceased and also the truck of the defendant just before the accident happened and that he saw Kapanitis on the crosswalk and

the time he was probably ten feet from the street car tracks; that when the witness first saw the truck it was fifty or sixty feet west of the crosswalk. From this witness' statement it appears that he had an unrestricted view of the defendant's truck, which was traveling at between 30 and 35 miles an hour; that when Zapantis reached the street car track the truck struck him and knocked him down. As the result of this Peter Zapantis died. The witness further testified that the truck was going at the same speed from the time when he first saw it until the truck hit Zapantis; that after the impact Zapantis was lying on the south side of the street car track on the crosswalk. The witness further testified that he did not hear any horn or warning signal given by the driver; that he yelled at the driver of the truck before the driver stopped; and that then the witness and the driver walked back to the place where the body of the deceased was lying.

It appears from the evidence of this driver, Wakony, that he did not see Rev. Zapantis before he came in contact with him; that he claimed he just got a glimpse of him as he was swinging out of the way.

There was a further witness, Norman C. Coughlin, who testified that the car was operated at approximately 20 miles an hour; that the car struck Rev. Zapantis from a place in back of the cab; that Rev. Zapantis spun around three or four times and was thrown several feet east, where he lay; and this witness did not know whether the truck changed its direction before the contact.

It appears also in this record that a deposition of Lillian Margaret Fuller was read to the jury. She testified that at the time of the accident she was a bookkeeper employed by the defendant, but at the time the deposition was taken she was not employed by the company. From the testimony it appears in the record that she was riding on the truck at the time of the accident. Her statement is that the Rev. Peter Zapantis was coming out from between parked cars and that he walked into the box part of the truck, which was the part behind the driver's cab, and that the driver of the truck swerved the truck to the left and made a sharp turn, stopped his truck and got out and went to the back of the truck



the time he was probably ten feet from the street car tracks; that when the witness first saw the truck it was fifty or sixty feet west of the crosswalk. From this witness' statement it appears that he had an unobstructed view of the defendant's truck, which was traveling at between 20 and 25 miles an hour; that when Zapantis reached the street car track the truck struck him and knocked him down. As the result of this Peter Zapantis died. The witness further testified that the truck was going at the same speed from the time when he first saw it until the truck hit Zapantis; that after the impact Zapantis was lying on the south side of the street car track on the crosswalk. The witness further testified that he did not hear any horn or warning signal given by the driver; that he yelled at the driver of the truck before the driver stopped; and that then the witness and the driver walked back to the place where the body of the deceased was lying. It appears from the evidence of this driver, Watson, that he did not see Rev. Zapantis before he came in contact with him; that he claimed he just got a glimpse of him as he was swinging out of the way. There was a further witness, Norman C. Doughlin, who testified that the car was operated at approximately 20 miles an hour; that the car struck Rev. Zapantis from a place in back of the cab; that Rev. Zapantis spun around three or four times and was thrown several feet east; where he lay; and this witness did not know whether the truck changed its direction before the contact. It appears also in this record that a deposition of Lillian Margaret Fuller was read to the jury. She testified that at the time of the accident she was a bookkeeper employed by the defendant, but at the time the deposition was taken she was not employed by the company. From the testimony it appears in the record that she was riding on the truck at the time of the accident. Her statement is that the Rev. Peter Zapantis was coming out from between parked cars and that he walked into the box part of the truck, which was the part behind the driver's cab, and that the driver of the truck reversed the truck to the left and made a



It appears from this statement that there is a contradiction between the evidence of this young lady and that of the driver of the truck. The driver, as we recall it, did not see the deceased in his lifetime up to the time when he was killed, but the girl who was seated on the truck with the driver said she saw him and that he walked into the box part of the truck.

When the speed of the car is considered from the testimony of the witnesses who appeared there, it is apparent that its speed was such that after the contact the body of the deceased was spun around three or four times and was thrown several feet east, and that fact does not indicate the speed of 12 miles an hour testified to by the driver of the truck as being the speed at which it was going at the time of the impact.

There was no warning given, and the driver apparently did not see the deceased before he was struck, and then the driver proceeded a distance of 80 feet after he struck the deceased.

It appears that in that busy section at Halsted and Randolph Streets Wekony was driving at what one witness stated was 30 or 35 miles an hour at the time just previous to the accident. Even the witness who failed to give his name to the police officer at the time of the accident testified that the truck was going 20 miles an hour. So that as the driver did not see the deceased just before he struck him and did not signal or give any alarm, it is apparent from the record that he was operating the truck in a negligent manner.

There is not anything that the deceased did that would justify a conclusion that he was guilty of contributory negligence; he was walking on the street at 3:00 o'clock in the afternoon and the daylight was sufficient so that the driver of this truck should have seen him.

So, considering the facts as they appear, I reach the conclusion that the court was in error when it affirmed the judgment that was entered upon the verdict of the jury finding the defendant not guilty.

It appears from this statement that there is a contradiction between the evidence of this young lady and that of the driver of the truck. The driver, as we recall it, did not see the deceased in his lifetime up to the time when he was killed, but the girl who was seated on the truck with the driver said she saw him and that he walked into the box part of the truck.

When the speed of the car is considered from the testimony of the witnesses who appeared there, it is apparent that the speed was such that after the contact the body of the deceased was thrown around three or four times and was thrown several feet east, and that fact does not indicate the speed of 12 miles an hour testified to by the driver of the truck as being the speed at which it was going at the time of the impact.

There was no warning given, and the driver apparently did not see the deceased before he was struck, and then the driver proceeded a distance of 80 feet after he struck the deceased.

It appears that in that busy section at Main and Randolph Streets, known as being at what one witness stated was 30 or 35 miles an hour at the time just previous to the accident. Even the witness who failed to give his name to the police officer at the time of the accident testified that the truck was going 30 miles an hour. So that as the driver did not see the deceased just before he struck him and did not signal or give any alarm, it is apparent from the record that he was operating the truck in a negligent manner.

There is not anything that the deceased did that would justify a conclusion that he was guilty of contributory negligence; he was walking on the street at 2:00 o'clock in the afternoon and the daylight was sufficient so that the driver of this truck should have seen him.

So, considering the facts as they appear, I reach the conclusion that the court was in error when it affirmed the judgment that was entered upon the verdict of the jury finding the defendant not guilty.



42551

GEORGIANA G. HESS, Individually and as  
Administratrix with the Will Annexed of  
the Estate of Georgiana L. Gilbert,  
Deceased,

Plaintiff - Appellant,

v.

HELEN S. GILBERT, VICTORIA C. NELSON  
and H. A. NELSON,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

330 I.A. 134<sup>2</sup>

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Helen S. Gilbert and Georgiana G. Hess are the daughters and sole surviving heirs and next of kin of Georgiana L. Gilbert and Hiram T. Gilbert, both deceased. Georgiana is divorced and Helen is a spinster. The mother died at about 3:00 a.m. on January 11, 1935, and the father died on November 29, 1939. On September 21, 1899 the mother became the owner of the real estate commonly known as 5234 South Woodlawn Avenue, Chicago. It was improved with a three story frame fourteen room house, with a garage in the rear, and was occupied by the parents and two daughters. Mr. Gilbert remarried on June 1, 1935. He then moved away from the premises and lived with his second wife at a location not disclosed by the record until December 23, 1935. At that time Mr. Gilbert and his wife moved into a three room apartment at the Del Prado Hotel in Chicago. His second wife died in May, 1936. On July 31, 1940 Georgiana G. Hess, individually and as administratrix with the will annexed of the estate of her mother, filed a complaint in chancery in the Superior Court of Cook County against her sister Helen L. Gilbert and Victoria C. Nelson and H. A. Nelson. She alleged that in a will made by her mother on August 24, 1917 and admitted to probate on July 22, 1940, the Woodlawn Avenue real estate was devised to the two sisters in equal shares; that the premises have a reasonable



ADMINISTRATIVE - WILL  
The estate of  
deceased,  
ADMINISTRATIVE - WILL

WILLIAM A. NELSON  
and M. A. NELSON

ADMINISTRATIVE - WILL

RE: PETITION FOR PROBATE OF THE WILL OF THE DECEASED  
Nelson A. Gilbert and George A. Nelson are the heirs  
and sole surviving heirs and next of kin of George A. Gilbert  
and William T. Gilbert, both deceased. George A. Gilbert died and  
Nelson is a citizen. The mother died at about 2:00 a.m. on  
January 11, 1938, and the father died on November 22, 1939. On  
October 21, 1939 the mother became the owner of the real estate  
commonly known as 2324 South Woodlawn Avenue, Chicago. It was  
improved with a three story frame fourteen room house, with a  
garage in the rear, and was owned by the parents and two daughters.  
Mr. Gilbert resided on June 1, 1935. He then moved away from the  
premises and lived with his second wife at a location not disclosed  
by the record until December 22, 1935. At that time Mr. Gilbert  
and his wife moved into a three room apartment at the Del Prado Hotel  
in Chicago. His second wife died in May, 1936. On July 22, 1940  
George A. Gilbert, individually and as administratrix with the will  
annexed of the estate of her husband, filed a complaint in equity  
in the Superior Court of Cook County against her sister Nelson A.  
Gilbert and William T. Gilbert and M. A. Nelson. The alleged facts  
in a bill were by her mother on August 22, 1917 and assigned to  
probate on July 22, 1940. The Woodlawn Avenue real estate was devised  
to the two sisters in equal shares; that the parties have a residence

rental value of \$125 per month; that about September, 1935 Helen and the Nelsons fraudulently conspired to deprive her (plaintiff) of the use and benefit of the premises and of the rents by falsely pretending that Helen was the owner in fee simple of the premises by virtue of a warranty deed from their parents to Helen dated November 7, 1934 and recorded at 1:17 P.M. January 11, 1935; that the warranty deed was not delivered to the grantee during the lifetime of their mother and was never intended to be delivered during the mother's lifetime; that it was not recorded until about eight hours after the death of their mother; that it was void and ineffective to convey any title; that the defendants, in furtherance of their conspiracy, entered into an agreement whereby the Nelsons were permitted to enjoy the use and benefit of the premises under a pretended lease without the payment of any rent; that to accomplish this purpose Victoria C. Nelson, as the pretended lessee and in collusion with Helen, brought an action against plaintiff in forcible detainer in the Municipal Court of Chicago, which resulted in a judgment finding plaintiff guilty of withholding the premises from Victoria C. Nelson. Plaintiff further alleged that the Municipal Court of Chicago did not have jurisdiction to try the title to the real estate; that she was unable to make any defense to that action; that on November 15, 1935, after the entry of judgment, she was obliged to and did vacate the premises; that since then the defendants have been occupying the premises together to the exclusion of plaintiff; that the defendants have damaged the interior finish of the premises; that on December 16, 1935 there was recorded a declaration of trust by Helen in which under date of November 7, 1934 she declares that she would hold the title to the real estate in trust for her sister and herself for the purpose of converting it into money, retaining one-half of the proceeds and paying over the remaining one-half to her sister, the latter to be paid only into Georgiana's own hand for her own sole support and maintenance and not to be assignable by her or subject to any liabilities which she might contract, Helen agreeing to consult her sister as to



rental value of the premises; that about December, 1933 when the  
the Nelsons fraudulently converted to their use (conversion) of the  
use and benefit of the premises and of the title by fraudulently  
that Nelson was the owner in fee simple of the premises at the time of  
a warranty deed from their parents to Nelson dated November 7, 1934  
and recorded at 117 S.W. January 11, 1935; that the warranty deed  
was not delivered to the trustee during the life of their mother  
and was never intended to be delivered during the mother's lifetime;  
that it was not recorded until about eight months after the death  
of their mother; that it was void and ineffective to convey any title;  
that the defendants, in furtherance of their conspiracy, obtained into  
an agreement whereby the Nelsons were permitted to enjoy the use and  
benefit of the premises under a pretended lease without the consent  
of any party; that to accomplish this purpose Victoria E. Nelson,  
as the pretended lessor and in collusion with Nelson, brought an  
action against plaintiff in forcible detainer in the Municipal Court  
of Chicago, which resulted in a judgment finding plaintiff guilty of  
withholding the premises from Victoria E. Nelson. Plaintiff further  
alleges that the Municipal Court of Chicago did not have jurisdiction  
to try the title to the real estate; that she was unable to raise  
any defense to that action; that on November 15, 1935, after the entry  
of judgment, she was obliged to and did vacate the premises; that  
since then the defendants have been occupying the premises together  
to the exclusion of plaintiff; that the defendants have converted the  
interior finish of the premises; that on December 15, 1935 there was  
recorded a declaration of trust by Nelson in which Nelson dated at  
November 7, 1934 and declares that she would hold the title to the  
real estate in trust for her sister and herself for the purpose of  
converting it into money, retaining one-half of the proceeds and  
paying over the remaining one-half to her sister, the latter to be  
sold only into defendant's own hand for her own sole support and  
maintenance and not to be contingent by her or subject to any liabilities

the price and terms before making any sale, providing Georgiana remains in the city, and that in case of the death of either sister before disposing of the property, the proceeds of the sale to go to the survivor. Plaintiff alleged further that this declaration of trust was in fact an admission by Helen that the pretended warranty deed of November 7, 1934 was not to be delivered until after the death of the grantor; that Helen fraudulently pretends that she is not obliged to account to plaintiff for the reasonable value of the rents; that on March 1, 1935 plaintiff recorded an affidavit asserting that she was the owner of an undivided one-half interest in the real estate and that the warranty deed dated November 7, 1934 was not delivered during the lifetime of the grantor. Plaintiff prayed that a decree be entered finding that defendants wrongfully obtained and kept possession of the premises, requiring them to account to plaintiff for the reasonable value of the rents from November 16, 1935; finding that the warranty deed dated November 7, 1934 is void and ineffective to convey any right, title or interest; that the declaration of trust of November 7, 1934 be declared void and ineffective to create a trust; that the judgment of the Municipal Court of Chicago entered in the forcible detainer case be declared ineffective to determine her (Georgiana's) rights in the premises; that in the alternative, should the court find the deed dated November 7, 1934 to have been duly delivered that Helen be decreed to account to plaintiff for the reasonable rental value of the premises as a trustee; that the plaintiff have the right to occupy the premises as a beneficiary under the trust; that plaintiff have the right to recover the amount by which the premises were depreciated and damaged; and that she be allowed a reasonable attorney's fee. Defendants filed a motion to strike the complaint on the ground of plaintiff's laches. The court reserved this point to the hearing of the case. The court struck the paragraph of the complaint which asked for the allowance of attorney's fees. On October 31, 1940 on motion of plaintiff, certain



the price and terms before the sale, providing reasonable  
 remains in the city, and that in case of the death of either party  
 before disposing of the property, the proceeds of the sale to be  
 to the survivor. Plaintiff alleged further that this declaration  
 of trust was in fact an admission of intent that the proceeds of the  
 sale of November 7, 1934 was not to be delivered until after the  
 death of the grantor; that Walter fraudulently procured that and is  
 not obliged to account to plaintiff for the reasonable value of  
 the trust; that on March 1, 1935 plaintiff received an affidavit  
 asserting that she was the owner of an undivided one-half interest  
 in the real estate and that the warranty deed dated November 7, 1934  
 was not delivered during the lifetime of the grantor. Plaintiff prayed  
 that a decree be entered finding that defendant wrongfully obtained  
 and kept possession of the proceeds, requiring same to account to  
 plaintiff for the reasonable value of the same from November 10, 1935;  
 finding that the warranty deed dated November 7, 1934 is void and  
 ineffective to convey any right, title or interest; that the declara-  
 tion of trust of November 7, 1934 be declared void and ineffective  
 to create a trust; that the judgment of the Municipal Court of Chicago  
 entered in the forfeiture matter be declared ineffective to  
 determine her (Georgia's) rights in the premises; that in the alter-  
 native, should the court find the deed dated November 7, 1934 to have  
 been only delivered that same be declared to account to plaintiff  
 for the reasonable rental value of the premises as a trust; that  
 the plaintiff have the right to convey the premises as a tenant in  
 common with the trust; that plaintiff have the right to recover the amount  
 by which the proceeds were dissipated and consumed; and that she be  
 allowed a reasonable attorney's fee. Defendant filed a motion to  
 strike the complaint on the ground of plaintiff's fraud. The court  
 refused that motion on the hearing of the case. The court there-  
 upon entered a judgment which was the subject of the appeal of  
 Georgia's case. On October 21, 1940 on motion of plaintiff, certain

paragraphs of the answer were stricken. On November 26, 1940 defendants filed an amended answer, stating that they were informed that the premises were not worth in excess of \$3,500; that the rental value was not more than \$35 a month; that Helen was acting in good faith and taking care of the premises under the deed and declaration of trust; that she was the lawful owner of the premises; that the deed was delivered to her during the lifetime of her mother; that for many years prior to the death of their parents their father contributed to the support of plaintiff; that Helen also contributed to the support of plaintiff; that the parents regarded plaintiff as a spendthrift and incapable of ~~xx~~ handling her own financial affairs; that the relations between the sisters became strained; that they were unable to live amicably in the family home; that as a solution the parents conceived the plan of deeding the property to Helen and having her execute a declaration of trust to protect the one-half interest of Helen; that in furtherance of this plan the deed and declaration of trust were made and delivered; that on or about October 1, 1935 she (Helen) as trustee and lessor entered into a lease with Victoria C. Nelson, whereunder the lessee "was given a concession of five months' rent at \$25 a month for doing her own cleaning, renovating and decorating of said 14 room house. Further, said lessee agreed to pay a monthly rental of \$25 per month and to do or cause to be done such repair work on said premises as was reasonably required to keep the same in good, habitable condition". Defendants answered further that the lease was thereafter renewed from year to year and that the Nelsons were then occupying the premises under the lease; that H. A. Nelson, one of the defendants, is a skilled carpenter; that since the making of the lease he has repaired the steps, window panes, window cords, windows, cleaned the fire place flues, scraped the floors, cleaned the basement, kept the yard in good condition and did other work on the premises, such service being of an average value of \$10



Paragraphs of the answer were set out, on November 20, 1935.  
Defendants filed an amended answer, stating that they were informed  
that the premises were not worth in excess of \$2,000; that the value  
value was not more than \$25 a month; that Helen was acting in good  
faith and taking care of the premises under the deed and declaration  
of trust; that she was the lawful owner of the premises; that the  
deed was delivered to her during the lifetime of her mother; that  
for many years prior to the death of their parents their father con-  
tributed to the support of plaintiff; that Helen also contributed to  
the support of plaintiff; that the parents regarded plaintiff as a  
dependent and incapable of handling her own financial affairs;  
that the relations between the sisters became estranged; that they  
were unable to live amicably in the family home; that as a solution  
the parents conceived the plan of executing the property to Helen and  
having her execute a declaration of trust to protect the one-half  
interest of Helen; that in furtherance of this plan the deed and  
declaration of trust were made and delivered; that on or about October  
1, 1935 the (Helen) as trustee and lessee entered into a lease with  
Victoria C. Nelson, whereunder the lessee "was given a concession  
of five months' rent at \$25 a month for doing her own cleaning,  
renovating and decorating of said 14 room house. Further, said lessee  
agreed to pay a monthly rental of \$25 per month and to do or cause to  
be done such repair work on said premises as was reasonably required  
to keep the same in good, habitable condition". Defendants answered  
further that the lease was thereafter renewed from year to year and  
that the Nelsons were then occupying the premises under the lease;  
that M. C. Nelson, one of the defendants, is a skilled carpenter; that  
since the making of the lease he has repaired the steps, window sills,  
window covers, windows, cleaned the fire place flues, scraped the floors,  
cleaned the basement, kept the yard in good condition and did other  
work on the premises, such repairs being of an average value of 10

a month; that Victoria C. Nelson was compelled to bring the forcible detainer action because Georgiana, who was residing in the premises up to October, 1935, sought to drive the lessees therefrom; that after the making of the lease Georgiana "on several occasions" ordered the lessees to vacate the premises and on one occasion physically attacked the lessees; and that all of this made it necessary for Victoria C. Nelson to institute the forcible detainer action. Defendants answered further that it appears from the affidavit recorded by Georgiana on March 1, 1935 that Georgiana claimed as early as February 25, 1935 that the warranty deed sought to be set aside was not delivered during the lifetime of their mother; that the instant complaint was not filed until July 31, 1940 more than five years thereafter; that in the meantime Helen, relying upon the validity of the deed, advanced out of her own funds various sums of money in payment of expenses and taxes on the property, and that by reason of the delay plaintiff has been guilty of gross laches and was barred from any relief in equity and that defendants were not guilty of any conspiracy or fraud. On December 2, 1940 Georgiana filed a replication to the amended answer. She asserted that Helen had no authority to make the lease with the Nelsons; that the sum of \$25 per month for the rental of the premises was inadequate, denied that the Nelsons made any repairs upon the premises, except such as would be required of any tenant, and denied that she physically attacked the Nelsons. She alleged that Helen, since prior to November 15, 1935, kept and reserved for her own personal use two rooms of the premises and kept her permanent abode and residence in the premises; denied that Helen contributed any amount toward the maintenance and support of plaintiff and denied that Helen expended any moneys from her own funds in payment of taxes or any other expenses on the property.

On April 15, 1942 Helen presented a petition alleging that for some months prior to October 1, 1941 the dwelling was unoccupied, except for certain possessions belonging to Georgiana being stored therein; that during the time Georgiana lived in the premises she



...month; that Victoria C. Nelson was compelled to leave the premises  
...action because Georgia, who was residing in the premises  
up to October, 1935, sought to drive the lessee therefrom; that  
after the expiry of the lease Georgia "on several occasions"  
ordered the lessee to vacate the premises and on one occasion  
physically attacked the lessee; and that all of this was necessary  
for Victoria C. Nelson to institute the forcible detainer action.  
Defendants answered further that it appears from the affidavit recorded  
by Georgia on March 1, 1935 that certain claims are made as  
February 25, 1935 that the property was sought to be sold and was  
not delivered during the lifetime of their mother; that the instant  
complaint was not filed until July 11, 1940 more than five years there-  
after; that in the meantime defendant, relying upon the validity of the  
deed, advanced out of her own funds various sums of money in payment  
of expenses and taxes on the property, and that by reason of the delay  
plaintiff has been guilty of gross laches and was barred from any  
relief in equity and that defendants were not guilty of any conspiracy  
or fraud. On December 7, 1940 Georgia filed a replication to the  
amended answer. She asserted that Nelson had no authority to make the  
lease with the Nelsons; that the sum of \$250 per month for the rental  
of the premises was inadequate, denied that the Nelsons made any  
repairs upon the premises, except such as would be required of any  
tenant, and denied that she physically attacked the Nelsons. She  
alleged that Nelson, since prior to November 15, 1935, kept and reserved  
for her own personal use two rooms of the premises and that her  
permanent home and residence in the premises; denied that Nelson  
contributed any amount toward the maintenance and support of plaintiff  
and denied that Nelson expended any money from her own funds in  
payment of taxes or any other expenses on the property.  
On April 15, 1942 Nelson presented a petition claiming that  
for some months prior to October 1, 1941 the dwelling was unoccupied,  
except for certain possessions belonging to Georgia being stored  
therein; that during the time Nelson lived in the premises she

occupied certain rooms on the third floor; that included with these rooms were a bath room and a closet; that in the Fall of 1941 she packed all of her personal belongings contained in the rooms and placed them in certain drawers in a closet located on the third floor and locked the same; that in these rooms were a bed, chairs, other furniture and a quantity of artist's materials belonging to her; that on January 24, 1941 Georgiana filed her petition requesting that she be permitted to occupy a portion of the dwelling house and to place therein her personal belongings; that this petition was denied; that despite such denial Georgiana on November 1, 1941 moved into the premises and took up her abode therein; that subsequently Georgiana, by force or through the use of a key, secured access and entry to the premises wherein Helen had stored her personal belongings and removed therefrom these personal belongings and furnishings and converted them to her own use; that Georgiana leased the rooms to certain roomers or boarders who brought their own belongings and damaged and destroyed the possessions of Helen; that the entry into the premises by Georgiana and these third parties constituted a contempt of court; that she (Helen) asked that a rule be entered against Georgiana to show cause why she should not be punished for contempt, that an order be entered that Georgiana vacate the premises and cause to be removed therefrom all persons to whom she gave possession,, and that she surrender all furnishings, furniture and property of defendant (Helen) stored on the third floor which she had removed. On April 25, 1942 Georgiana answered this petition, admitting that on January 24, 1941 she made application for leave to occupy the dwelling house; that no action was taken on the application; that on July 1, 1941 Helen handed to her (Georgiana) the key to the premises; that thereupon she (Georgiana) went upon the premises and made certain repairs which were necessary for the protection of the building and to prevent deterioration; that she also expended money for the purchase of coke; that she paid or obligated herself to pay



occupied certain rooms on the third floor; that included the three rooms were a bath room and a closet; that in the fall of 1941 Helen packed all of her personal belongings contained in the rooms and placed them in certain drawers in a closet located on the third floor and looked the same; that in these rooms were a bed, dresser, other furniture and a quantity of artist's materials belonging to her; that on January 24, 1941 Georgiana filed her petition requesting that she be permitted to occupy a portion of the dwelling house and to place therein her personal belongings; that this petition was denied; that Georgiana and Helen Georgiana on November 1, 1941 moved into the premises and took up her abode therein; that subsequently Georgiana, by force or through the use of a key, secured access and entry to the premises wherein Helen had stored her personal belongings and removed therefrom these personal belongings and furnishings and converted them to her own use; that Georgiana leased the rooms to certain roomers or boarders who brought their own belongings and damaged and destroyed the possessions of Helen; that the entry into the premises by Georgiana and these third parties constituted a covert act; that she (Helen) asked that a writ be entered against Georgiana to show cause why she should not be enjoined for contempt; that an order be entered that Georgiana vacate the premises and cause to be removed therefrom all persons to whom she gave possession; and that she surrender all furnishings, furniture and property or chattels (Helen) stored on the third floor which she had removed. On April 20, 1942 Georgiana answered this petition admitting that on January 24, 1941 she made application for leave to occupy the dwelling house; that no action was taken on the application; that on July 1, 1941 Helen moved to her (Georgiana) the key to the premises; that thereupon she (Georgiana) went upon the premises and made certain repairs which were necessary for the protection of the building and to prevent deterioration; that she also expended money for the purchase of coal; that she paid or obligated herself to pay

\$592.32; that she used a key to enter the premises, which was the key furnished to her by Helen; that she did not remove from the premises any of the personal belongings and furnishings therein, nor did she convert the same to her own use; that since February 1, 1942 she has been using so much of the furniture contained in the premises as was convenient; that she did not dispose of, damage or destroy any of the possessions of Helen. She denied that she broke into any of the rooms and states that she used a key for the purpose of entering the various rooms. She denied that she damaged, destroyed or disposed of any of the personal belongings of her sister. In her answer she quoted a letter dated February 21, 1942, which she wrote to Helen. In this letter she told about making the repairs and about moving into the house on February 1, 1942. She concluded by stating that "a number of people are interested in renting rooms and I am anxious to get them ready as quickly as possible". She asked Helen's cooperation to the extent of reimbursing her for one-half the cost of heating. The answer does not mention that any reply was received from Helen. On August 14, 1942 Georgiana filed an amendment to her answer, stating that for about five years prior to July 1, 1941 her sister and certain tenants occupied the premises; that these tenants vacated on or about July 1, 1941; that after they vacated an agreement was made between the attorneys representing each of the sisters that Georgiana be permitted to go into possession of the premises and that she rent the same to the best advantage; that Helen delivered the key to the premises to her (Georgiana); that she then made the repairs heretofore mentioned, placing the premises in a habitable condition; that she gave a lease to a tenant at a rental of \$40 a month, pursuant to the agreement between the attorneys; that she (Georgiana) brought her furniture to the premises and now resides there; that she was employed during the day at a small remuneration as a pantry woman; that her sister is a school teacher, lives at the Del Prado Hotel and has a lucrative income; and that she requested that the status be not disturbed. On August 14, 1942 the following order was entered:



1942; that the use of the word "house" was the only  
turned to her by Helen; that she did not receive from the  
any of the personal belongings and furniture therein, nor did she  
convert the same to her own use; that since February 1, 1942, she has  
been using as much of the furniture contained in the premises as was  
convenient; that she did not dispose of, remove or destroy any of the  
possessions of Helen. She denied that she wrote into any of the rooms  
and states that she used a key for the purpose of entering the  
rooms. She denied that she damaged, destroyed or disposed of any of  
the personal belongings of her sister. In her answer she stated a  
letter dated February 21, 1942, which was wrote to Helen. In this  
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on February 1, 1942. She concluded by stating that "a number of people  
are interested in seeing around I as a house to get them ready as  
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reimbursing her for one-half the cost of heating. The answer does not  
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years prior to July 1, 1941 her sister and certain friends occupied the  
premises; that these friends vacated on or about July 1, 1941; that  
after they vacated an agreement was made between the attorney representing  
each of the sisters that Georgiana be permitted to go into possession  
of the premises and that she rent the same to the best advantage; that  
Helen delivered the key to the premises to her (Georgiana); that she then  
made the repairs heretofore mentioned, placing the premises in a habitable  
condition; that she gave a loan to a tenant of a house at 2602 a house,  
pursuant to the agreement between the attorney; that she (Georgiana)  
brought her furniture to the premises and now resides there; that she  
was employed during the day of a retail commission as a sales woman;  
that her sister is a school teacher, lives at the 2611 West 20th and  
has a first live income; and that she requested that the status be not  
disturbed. On August 14, 1942 the following order was entered:

"On motion of attorney for Helen Gilbert, this cause coming on for further hearing upon the petition of Helen Gilbert filed herein on the fifteenth day of April, 1942, and the answer of Georgiana Hess thereto, all parties being present by their respective counsel, and the court having heard evidence upon the former hearing herein and having heard the arguments of counsel, finds that a prior lease of said premises at 5234 Woodlawn Avenue, Chicago, Illinois, exists between Georgiana Hess either as agent or individually and one J. R. Kohlenberger, the exact terms of which are not known to the court. The court does further find said lease was made without power or authority by said Georgiana Hess and the same is not for the best interest of those in said premises and is unfair and inequitable. Wherefore the court does declare said lease null and void and does hereby order said J. R. Kohlenberger and all persons holding by or under him to vacate and give up possession of said premises on and by the first day of September, 1942 and that a writ of assistance issue in connection herewith."

Plaintiff appeals from this order.

Turning to the transcript of the proceedings before the chancellor, we note that the matter came on for hearing on May 12, 1942 in connection with the petition of Helen to have Georgiana held in contempt. At that time the case in chief was pending before a Master in Chancery. The attorney for Helen admitted that in July, 1941, after the Nelsons moved, Helen sent the key to Mrs. Hess. At that time the premises were unoccupied. He stated that Georgiana commenced heating the house in October, 1941, and that "my client didn't put her out, didn't do anything about it. Perhaps it was agreeable to her. Then she moved in entirely sometime in February. My client didn't say anything about the rest of the house; she had a room upstairs. My client went there about once a week with her drawing things - joint occupancy. In March she moved out the stuff of my client and appropriated these things to her own use. We say that is not right". The attorney for Helen contended that Georgiana should not interfere with Helen's studio on the third floor, and stated further that Georgiana is receiving an \$1800 annuity from her father's estate. Helen said: "The point is not so much her going up to the third floor. I kept my own room, like my room has been. The duplicate key was inside the room in the closet door. That locked one closet; the rest of the doors were open. I didn't like her going into my studio. I do object to have anybody enter a locked room, take my blankets out, my personal property, and dump my private things in a drawer, and just simply take them out, the things that



On motion of attorney for Helen Wilson, this court  
ordered on for further hearing from the petition of Helen Wilson  
filed herein on the fifteenth day of April, 1941, and the motion of  
Georgia Wilson, heretofore, all parties being present in their respective  
counsel, and the court having heard the evidence and the law being  
presented and having heard the arguments of counsel, there being a motion  
made of said petition of Helen Wilson, Wilson, Georgia, Wilson,  
exists between Georgia Wilson and Helen Wilson, Wilson, Georgia, Wilson,  
one J. J. Connelley, the exact terms of which are not known to the  
court. The court does further find said facts are as stated  
above or contrary to a full Georgia law and the same is not  
the best interest of those in said Wilson and is against and  
indefinite. Therefore the court does declare said facts null and  
void and hereby order said J. J. Connelley and all persons  
holding by or under him to vacate and give up possession of said  
premises on and by the first day of September, 1941 and that a writ  
of assistance issue in connection therewith."

The plaintiff appeals from this order.

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a master in Chancery. The attorney for Helen testified that in July,  
1941, after the Wilsons moved, Helen sent the key to Mrs. Wilson. At  
that time the premises were unoccupied. We stated that Georgia  
continued pending the house in October, 1941, and that "my client  
didn't get out, didn't do anything about it. Because it was  
agreeable to her. Then she moved in entirely sometime in February.  
My client didn't say anything about the rest of the house; she had  
a room upstairs. My client went there about once a week with her  
brother-in-law - John Connelley. In March she moved out the side  
of my client and represented these things to her own use. We say  
that is not right". The attorney for Helen contended that Georgia  
should not interfere with Helen's studio on the third floor, and  
stated further that Georgia is receiving an \$1800 annuity from her  
father's estate. Helen said: "The point is not so much her going  
up to the third floor. I kept my own room, like my room has been.  
The duplicate key was inside the room in the closed door. That  
locked one closed; the rest of the doors were open. I didn't like  
her going into my studio. I am object to have anybody enter a locked  
room, take my furniture out, my personal property, and make my private

are around. I do feel I have a case here, entering a locked room. This one room and the closet, that is the issue. It isn't the house. It is my private property, to enter it with a key." Helen stated that she had rented to a "very desirable party. They are working; they are taking care of the property. They are paying \$40 a month for two rooms on the third floor and the use of the dining room and kitchen, which is considerably more than my sister rented the house for. These people have no furniture. My furniture is still in storage. I took the first payment, making the house fit to live in. I had to pay rent for six years. In order to get in there, I had to do some plastering. I had to fix some windows. I had to have the furnace cleaned". As to the charge made by Helen, plaintiff stated: "I unlocked her door. I have a key to every room in that house. Her room was locked and the closet to the room, - that used to be the maid's, - was locked, so I unlocked the door. In there were these so-called art materials. There were two bushel baskets of glass containers. Whatever was there, I moved into the cedar closet, so they would be accessible to my sister. The cedar closet is about the size of the -- I left that note telling my sister where they were. I arranged them as neatly as I could. There was a golden oak board that had some discarded clothing. There was nothing of any value. Her room was the south room. The middle south room was father's room. It had some furniture. Nothing was said about that. In the big window there was some drawers; those were full. In order to make room for those things, I took some bedding from the drawer in my sister's closet, because they were big things. I thought it would be simpler to put all the little things in her room. Her bedding is on the second floor. She had access to it. She can remove or she can rearrange it. I needed that closet to use. I needed the closet drawers in the other rooms". The attorney for Helen stated: "They are either joint tenants or tenants in common; she is <sup>half</sup> a/tenant". Referring to the use of part of the third floor called the "art studie", Georgiana said: "When summer time comes if she wants to use it, I can move these people down to the second floor. There are only two baths.



are around. I do feel I have a good right, entering a locked room. This one room and the closet, that is the house. It isn't the house. It is my private property, as stated in the deed. Helen stated that she had wanted to a very beautiful party. They are working; they are taking care of the property. They are paying me a month for two rooms on the third floor and the use of the dining room and kitchen, which is considerably more than my sister wanted the house for. These people have no furniture. My furniture is still in storage. I took the first payment, making the house fit to live in. I had to pay rent for six years. In order to get in there, I had to do some plastering. I had to fill some windows. I had to have the house cleaned. As to the charge made by Helen, Alastair stated: "I unlocked her door. I have a key to every room in that house. Her room was locked and the closet to the room - that used to be the maid's - was locked, so I unlocked the door. In there were these so-called and materials. There were two hundred baskets of glass containers. However was there, I moved into the cedar closet, as they would be accessible to my sister. The cedar closet is about the size of the -- I left that note telling my sister where they were. I arranged them as neatly as I could. There was a golden oak board that had some Alexander clothing. There was nothing of any value. Her room was the south room. The middle north room was father's room. It had some furniture. Nothing was said about that. In the window there was some drawers; those were full. In order to come now for those things, I took some bedding from the drawer in my sister's closet, because they were big things. I thought it would be easier to put all the little things in her room. Her bedding is in the second floor. She had access to it. She can move or she can remove it. I needed that closet to use. I needed the closet drawers in the other rooms. The attorney for Helen stated: "They are either joint tenants or tenants in common; she is a tenant." Referring to the use of part of the third floor called the "garage", Georgia said: "When someone else comes to the house to see it, I can

The second floor bath leaks a little bit. I don't want that used until it is fixed. I am living on the second floor. That gives them a bath to themselves. My sister comes once in two or three months. She can come now just as well as she ever did. Nothing has been touched in her room except moving the bedding. I am letting the daughter of these other people sleep there. I asked my sister to cooperate to the extent of advancing some money. I just moved two pieces of furniture. She just does not like it because I took two pieces of furniture out of the room". The attorney for Helen stated: "We can't enter that business proposition of rehabilitating that place". The chancellor said "I would suggest to remove these tenants. That is the bone of contention." Georgiana answered: "They have a lease until October". The chancellor said: "I will hold now the lease is invalid". Mrs. Hess responded: "I was given permission to rent to them," and the chancellor asked, "By whom?" Georgiana answered "By my sister and her attorney. I was given the permission of renting my flat." The chancellor then stated: "I think that will be the only order I will issue, is to order them out with a writ of assistance." The only comment of Helen was: "She has six bedrooms on the second floor. They aren't any of them fit to use." The chancellor remarked that the only subject matter before the court was the "partition suit." The attorney for Helen stated: "That partition suit is an off-shoot of a cross-count in the cross-complaint." The record brought to this court does not show a cross-complaint, a cross-count or any allegations or prayer for partition. When the chancellor indicated that he would issue a writ of assistance against the tenants, Helen said: "It was moving the bed and the bureau. I don't mind if she keeps people in the house. She has six bedrooms on the second floor. There are five that can be used". The chancellor said: "I haven't any disposition to chase these people out if you can get along". Georgiana stated: "I am lucky to get anybody to live in the house." The court then suggested that she get the bath room on the second floor repaired. The attorney for Helen responded: "It is understood we will not pay one



The second floor of the house is a little off. I don't want to live there until it is fixed. I am living on the second floor. That is the best place to live. My sister comes down to see me every month. She can come now just as well as she ever did. Nothing has changed in her room except saving the bedding. I am leaving the daughter of these other people alone there. I asked my sister to cooperate to the extent of advancing some money. I just moved two pieces of furniture. The last does not like it because I took two pieces of furniture out of the room. The attorney for Helen stated: "We can't enter that business proposition of rehabilitation that alone." The chancellor said "I would suggest to remove these women. That is the best of contention." Georgia answered: "They have a house until October." The chancellor said: "I will hold now the house is invalid." Mrs. Hens responded: "I was given permission to rent to them," and the chancellor asked, "Why then?" Georgia answered "My my sister and her attorney. I was given the permission of renting my first." The chancellor then stated: "I think that will be the only order I will issue, is to order them out with a writ of assistance." The only comment of Helen was: "The six bedrooms on the second floor. They aren't any of them fit to use." The chancellor remarked that the only subject matter before the court was the "partition suit." The attorney for Helen stated: "That partition suit is an off-shoot of a cross-suit in the cross-complaint." The record brought to this court does not show a cross-complaint, a cross-suit or any allegations or prayer for partition. When the chancellor indicated that he would issue a writ of assistance against the house, Helen said: "It was moving the bed and the bureau. I don't mind if she leaves people in the house. The six bedrooms on the second floor. There are five that can be used." The chancellor said: "I haven't any objection to chase these people out if you can get along." Georgia stated: "I am lucky to get anybody to live in the house." The court then suggested that she and her sister move on the second floor. The attorney for Helen responded: "It is understood we will not move the

cent\$ to have that building rehabilitated. They can't compel us to". Helen said she would like to have her personal room and her studio. She stated further: "I would like to have what was in them restored. She may use temporarily the other rooms. I want access to the bath. If she will put back the things, I will make a favor on the locked ones. She may put the things from the cedar closet into my room. I have decorated it myself". At this hearing the parties did not arrive at any solution of their difficulties and the chancellor did not enter any formal order. At the conclusion of the hearing he said, addressing Georgiana: "You restore her studio and these other rooms and you stay on the second floor". The hearing was resumed on August 14, 1942. The attorney for Georgiana reminded the chancellor of the discussion at the previous hearing and said: "Your order was you said to throw out those tenants and allow these women to go along on the pleadings of Mrs. Hess. We said we would let the tenants stay. I knew that court was going to adjourn and that they would probably have to come in again, that they would not live up to their agreement and we would be in the soup. They have not moved an inch and have just given us conversation and I can't get them to move unless I come in here. I want your honor to read that transcript". The chancellor stated that he had directed that the tenant move from the third to the second floor and that he was going to order the tenant out of the house. The attorney for Georgiana stated that the previous attorneys for the parties who had made the agreement heretofore alluded to were in the courtroom and ready to testify about the agreement. The chancellor stated that he did not care to hear from them, and added: "I am going to get that tenant out of there." He then inquired as to the name of the tenant and this information was given by Georgiana. She asked as to whether the chancellor wished the tenant moved out of the third floor. The latter answered that he wished the tenant moved out of the building entirely. Georgiana then stated: "They have a lease until October 1st."



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...entirely. Georgia then stated: "They have a lease until October 1st."

The chancellor said: "I have cancelled the lease. They have until the first of September to get out". The court then entered the order appealed from. It is interesting to note that the order recognized that there is a lease between Georgiana and J. R. Kohlenberger, "the exact terms of which are not known to the court." The court declared the lease null and void and ordered that "J. R. Kohlenberger and all persons holding by or under him to vacate and give up possession of the premises on or before September 1, 1942, and that a writ of assistance issue."

The case in chief is pending. Should plaintiff prevail in her contention that there was no delivery of her mother's deed, the sisters will be tenants in common under the will of their mother. Should Helen's position be sustained, then she (Helen) remains the owner of the legal title as trustee for herself and her sister under the conditions stated in the declaration of trust. In either event each sister will in equity have an undivided one-half interest. It is true that should Helen prevail she will by virtue of being the trustee have certain duties to perform in connection with carrying out the trust in accordance with the declaration of trust. It appears that the building is old and has not been maintained. It is in need of repair. The taxes have not been paid for several years. The complaint filed by Georgiana, among other things, assailed the action of Helen in renting to the Nelsons. Georgiana vacated the premises on November 15, 1935, following the judgment rendered against her in the forcible detainer suit. The complaint stated that the Nelsons and Helen began occupancy of the premises on November 15, 1935. The Nelsons vacated the premises about July 1, 1941. Georgiana then took possession of the premises and made certain repairs. She did not reside there, however, until February 1, 1942. The petition filed by Helen on April 15, 1942 complained that Georgiana "by force or through the use of a key, the existence of which was unknown to the petitioner", secured access to the premises. The relief sought in this petition



The Chancellor said: "I have considered the issue. There have been appeals from the first of October to the present. The court has entered the order appealed from. It is interesting to note that the order appealed from is that there is a lease between Georgia and J. E. Kolben, and that the exact terms of which are not known to the court." The court decided the lease null and void and ordered that J. E. Kolben and all persons holding by or under him to vacate and give up possession of the premises on or before September 1, 1942, and that a bill of assistance issue."

The case in chief is pending. Should plaintiff prevail in her contention that there was no delivery of her mother's deed, the estate will be tenants in common under the will of their mother. Should Nelson's position be sustained, then she (Nelson) retains the owner of the legal title as trustee for herself and her sister under the conditions stated in the declaration of trust. In either event each sister will in equity have an undivided one-half interest. It is true that should Nelson prevail she will by virtue of being the trustee have certain duties to perform in connection with carrying out the trust in accordance with the declaration of trust. It appears that the building is old and has not been maintained. It is in need of repair. The taxes have not been paid for several years. The complaint filed by Georgia, among other things, requested the action at law in relation to the Nelsons. Georgia wanted the premises on November 15, 1935, following the judgment rendered against her in the Georgia National suit. The complaint stated that the Nelsons and Nelson began occupancy of the premises on November 15, 1935. The Nelsons vacated the premises about July 1, 1941. Georgia then took possession of the premises and made certain repairs. She did not reside there, however, until February 1, 1942. The action filed by Nelson on April 15, 1942, complained that Georgia "by force or through the use of a key, the assistance of which was unknown to the plaintiff," entered upon the premises. The plaintiff sought in this action

was that a rule be entered requiring Georgiana to show cause why she should not be punished for contempt on account of entering the premises, and that an order be entered requirring Georgiana to turn over possession of the premises to Helen. From the excerpts quoted from the record it appears that on the hearing of the rule to show cause, Helen had no serious objection to the occupancy of the premises by her sister or by the tenants who had been given a lease by her sister. Helen objected to being charged for any part of the repairs ordered by her sister and she was very much offended by the fact that her personal belongings on the third floor were disturbed by her sister or the tenants. The chancellor endeavoring to compose the differences between the sisters, verbally ordered that the third floor be left entirely for Helen and that neither the tenant nor Georgiana enter that part of the house. Georgiana stated that it was necessary to use the bath room on the third floor. Helen did not ask the chancellor to evict the tenant. The eviction of the tenant was ~~xxx~~ proposed by the chancellor. When he announced that he would enter an order directing the issuance of a writ of assistance to evict the tenant, he was informed that the tenant had a lease. Nevertheless, the order against the tenant was entered. It does not appear that any order was entered on the motion for the rule to show cause why Georgiana should not be held in contempt of court, nor was there any order entered on Helen's request to have Georgiana give possession of the premises to her. The order eventually was directed against the tenant, who was not a party and who was not served with process or notice. The order is void. The Sheriff would not be warranted in evicting the tenant under that order. Clearly, the tenant is entitled to his day in court. In her brief Helen argues that "the so-called tenant, Joseph Kohlenberger, taking under respondent, Georgiana Hess, a party to the action, and taking pendente lite, is bound by all orders in the cause respecting the real property in suit". We are unable to comprehend how the doctrine of pendente lite affects this case. The tenant does not question



was that a rule be entered requiring defendant to show cause why she should not be punished for contempt on account of refusing the premises, and that an order be entered requiring defendant to turn over possession of the premises to Helen. From the evidence taken from the record it appears that on the hearing of the rule to show cause, Helen had no serious objection to the competency of the proposed sister, Helen objected to being charged for any part of the premises ordered by her sister and she was very much offended by the fact that her personal belongings on the third floor were disturbed by her sister or the tenants. The chancellor endeavored to compose the differences between the sisters, verbally ordered that the third floor be left entirely for Helen and that neither the tenant nor defendant enter that part of the house. Georgiana stated that it was necessary to use the bath room on the third floor. Helen did not let the chancellor to evict the tenant. The eviction of the tenant was never proposed by the chancellor. When he announced that he would enter an order directing the issuance of a writ of assistance to evict the tenant, he was informed that the tenant had a lease. Nevertheless, the order against the tenant was entered. It does not appear that any order was entered on the motion for the rule to show cause why Georgiana should not be held in contempt of court, nor was there any order entered to Helen's request to have Georgiana give possession of the premises to her. The order eventually was directed against the tenant, and was not a party and who was not served with process or notice. The order is void. The tenant would not be warranted in evicting the tenant under that order. Clearly, the tenant is entitled to his day in court. In her order Helen stated that "the so-called tenant, Joseph Robinson, was taking under respondent, Georgiana Ross, a party to the action, and said respondent is bound by all orders in the cause respecting the real property in suit." It was unable to comprehend that the doctrine of respondeat superior applies also here. The tenant does not question

the rights of the sisters as between themselves. In the hearings all that Helen asked was that the tenant and Georgiana do not disturb her (Helen) in the part of the premises that she occasionally occupied on the third floor. Before the right of the tenant could be adjudicated it would be necessary to make him a party and serve him with process, or that he appear in the case.

Helen further contends that Georgiana cannot urge on this appeal the matters affecting Joseph Kohlenberger, since he is not a party to the appeal. There was no motion to dismiss the appeal, which would be the appropriate procedure. We are of the opinion that Georgiana does have an interest in the subject matter of the appeal. Regardless of how the case in chief is decided she will be entitled to one-half interest in the premises. It cannot be doubted that she has an interest in having the premises rented so that the rent derived will inure to the benefit of both sisters. From the transcript we notice that there was an indication that the Kohlenberger lease would expire on September 30, 1942. The record does not show whether Kohlenberger vacated the premises at the expiration of the lease, or whether some arrangement was made whereby he remained in possession. It is unfortunate that these sisters are quarreling. Their dispute does not appear to be very serious. The order that was finally entered did not dispose of their dispute. It left Georgiana in possession of the premises, contrary to the prayer of Helen's petition, and it ordered the eviction of a tenant who was not a party, who was not served with process and who did not have his day in court.

For the reasons stated, the order of the Superior Court of Cook County entered August 14, 1942 is reversed.

ORDER REVERSED.

HEBEL AND KILEY, JJ. CONCUR.



the rights of the estate as between themselves. In the hearings all that Helen asked was that the tenant and Georgians do not disturb her (Helen) in the part of the premises that she occasionally occupied on the third floor. Before the right of the tenant could be adjudicated it would be necessary to make him a party and serve him with process, or that he appear in the case.

Helen further contends that Georgians cannot urge on this appeal the matters affecting Joseph Kohlenberger, since he is not a party to the appeal. There was no motion to dismiss the appeal, which would be the appropriate procedure. We are of the opinion that Georgians does have an interest in the subject matter of the appeal. Regarding of how the case is decided she will be entitled to one-half interest in the premises. It cannot be doubted that she has an interest in having the premises rented as that the rent derived will inure to the benefit of both sisters. From the transcript we notice that there was an indication that the Kohlenberger lease would expire on September 30, 1942. The record does not show whether Kohlenberger vacated the premises at the expiration of the lease, or whether some arrangement was made whereby he remained in possession. It is unfortunate that these sisters are quarreling. Their dispute does not appear to be very serious. The order that was finally entered did not dispose of their dispute. It left Georgians in possession of the premises, contrary to the prayer of Helen's petition, and it ordered the eviction of a tenant who was not a party, who was not served with process and who did not have his day in court. For the reasons stated, the order of the Superior Court of Cook County entered August 14, 1942 is reversed.

ORDER REVERSED.

HEBEL AND KILLY, JJ. CONCUR.

42655

DARLINE MOSS, individually and as  
Administratrix of the Estate of  
OLIVE E. BALCH, deceased,

Plaintiff - Appellee,

v.

JACK H. BALCH, et al., Defendants.

JACK H. BALCH, DALTON & BALCH, INC.,  
D. & B. MANUFACTURING CO., CARL L.  
PETERSON and M. J. BROWN,

Defendants - Appellants.

320 I.A. 135

APPEAL FROM

INTERLOCUTORY ORDER

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On August 18, 1919 a certification of incorporation was issued by the State of Illinois to Buick Exchange Inc. On August 22, 1921 the name was changed to Dalton & Balch, Inc. The place of business of this corporation was located at 2333 South Michigan Avenue, Chicago. The corporation issued 800 shares of stock of the par value of \$100 a share. Michael E. Dalton and Jack H. Balch founded the business, organized the corporation and owned the stock. Michael E. Dalton owned 398-3/4 shares of stock, Jack H. Balch owned the same number and 2 1/2 shares stood of record in the name of Carl L. Peterson. These 2 1/2 shares were actually owned equally by Michael E. Dalton and Jack H. Balch and were held by Peterson for their use and benefit. On November 22, 1926 Michael E. Dalton died testate. He bequeathed Olive E. Balch, the wife of Jack Balch, all of his 398-3/4 shares of capital stock. Olive E. Balch thereupon became the owner of 398-3/4 shares. Shortly thereafter Jack Balch acquired from Olive Balch 2-3/4 shares of capital stock and from Carl L. Peterson 2 1/2 shares then outstanding in his name, in accordance with a written agreement dated August 24, 1922 between Jack Balch and Michael Dalton. As a consequence Jack Balch became the majority stockholder of the corporation as the owner of 404 shares, and Olive Balch, as the owner of the balance of 396 shares, became the minority stockholder. From 1926 to March 1, 1937 Olive E. Balch, Jack H.



ADMINISTRATOR OF THE ESTATE OF  
OLIVE A. DALTON, deceased,  
Plaintiff - Appellee,

v.

JACK H. DALTON, et al., Defendants.  
JACK H. DALTON, DALTON & DALTON, INC.,  
D. & H. MANUFACTURING CO., CARL L.  
PETERSON and M. J. BROWN,  
Defendants - Appellants.

MR. PRESIDING JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

On August 18, 1919 a certification of incorporation was  
issued by the State of Illinois to Buick Exchange Inc. On August 22,  
1921 the name was changed to Dalton & Balch, Inc. The place of  
business of this corporation was located at 2335 South Michigan  
Avenue, Chicago. The corporation issued 800 shares of stock of the  
par value of 100 a share. Michael E. Dalton and Jack H. Balch  
founded the business, organized the corporation and owned the stock.  
Michael E. Dalton owned 388-3/4 shares of stock, Jack H. Balch owned  
the same number and 1/4 shares stood of record in the name of Carl L.  
Peterson. These 2 1/4 shares were actually owned equally by Michael  
E. Dalton and Jack H. Balch and were held by Peterson for their use  
and benefit. On November 23, 1928 Michael E. Dalton died testate.  
He bequeathed Olive A. Balch, the wife of Jack Balch, all of his  
388-3/4 shares of capital stock. Olive A. Balch thereupon became the  
owner of 388-3/4 shares. Shortly thereafter Jack Balch acquired  
from Olive Balch 2-3/4 shares of capital stock and from Carl L.  
Peterson 2 1/4 shares then outstanding in his name, in accordance with  
a written agreement dated August 24, 1922 between Jack Balch and  
Michael Dalton. As a consequence Jack Balch became the majority  
stockholder of the corporation as the owner of 400 shares, and Olive  
Balch, as the owner of the balance of 308 shares, became the minority

Balch and Carl L. Peterson were directors. On April 3, 1937 Olive Balch died. On May 1, 1939 Dalton & Balch, Inc. was dissolved by a decree of the Superior Court of Cook County. On August 10, 1936 a certificate of incorporation was issued to the D. & B. Manufacturing Co. This corporation did not actually commence operation of business until March 1, 1937. On that date all of the assets of Dalton & Balch, Inc., were transferred to the D. & B. Manufacturing Co., and the business previously conducted by Dalton & Balch, Inc. was thereafter operated and conducted by the D. & B. Manufacturing Co. with the same assets and most liabilities and the same customers. Of the 50 shares of stock authorized to be issued by the D. & B. Manufacturing Co., Jack Balch contends that 25-3/16 were issued in the name of M. J. Brown and 24-3/16 in the name of Samuel Green. The D. & B. Manufacturing Co., was dissolved on or about December 15, 1942. Jack Balch claims that he purchased the stock and took over and continued the business of the D. & B. Manufacturing Co. When Olive E. Balch died intestate on April 3, 1937 she left as her sole heirs and next of kin her husband Jack Balch and her daughter Darline Moss. Darline was not the daughter of Jack Balch. Darline Moss was appointed administratrix of the estate of Olive E. Balch, deceased, by the Probate Court of Cook County on May 8, 1941. On January 6, 1943 Darline Moss filed a verified complaint in chancery, individually and as administratrix of the estate of Olive E. Balch, deceased, in the Circuit Court of Cook County against Jack H. Balch, Dalton & Balch, Inc., D. & B. Manufacturing Co., Carl L. Peterson and M. J. Brown. In her complaint Darline alleged that her mother and Jack Balch owned in equal shares the capital stock of Dalton & Balch, Inc.; that they assigned 2 1/2 shares to Carl L. Peterson as qualifying shares; that Balch was president and treasurer; that Peterson was secretary and bookkeeper; that both were directors; that Mrs. Balch was not versed in business affairs; that she took no active part in the management



Balch and Carl L. Peterson were directors. On April 2, 1937 Olive Balch died. On May 1, 1938 Balch & Balch, Inc. was dissolved by a decree of the Superior Court of Cook County. On August 10, 1938 a certificate of incorporation was issued to the D. & B. Manufacturing Co. This corporation did not actually commence operation of business until March 1, 1937. On that date all of the assets of Balch & Balch, Inc., were transferred to the D. & B. Manufacturing Co., and the business previously conducted by Balch & Balch, Inc. was thereafter operated and conducted by the D. & B. Manufacturing Co. with the same assets and most liabilities and the same customers. Of the 80 shares of stock authorized to be issued by the D. & B. Manufacturing Co., Jack Balch contends that 25-2/3 were issued in the name of M. J. Brown and 54-2/3 in the name of Daniel Brown. The D. & B. Manufacturing Co. was dissolved on or about December 15, 1942. Jack Balch claims that he purchased the stock and took over and continued the business of the D. & B. Manufacturing Co. when Olive E. Balch died intestate on April 2, 1937 and left as her sole heir and next of kin her husband Jack Balch and her daughter Darline Moss. Darline was not the daughter of Jack Balch. Darline Moss was appointed administratrix of the estate of Olive E. Balch, deceased, by the Probate Court of Cook County on May 8, 1941. On January 8, 1943 Darline Moss filed a verified complaint in chancery, individually and as administratrix of the estate of Olive E. Balch, deceased, in the Circuit Court of Cook County against Jack E. Balch, Dalton & Balch, Inc., D. & B. Manufacturing Co., Carl L. Peterson and M. J. Brown. In her complaint Darline alleged that her mother and Jack Balch owned in equal shares the capital stock of Dalton & Balch, Inc.; that they assigned 25 shares to Carl L. Peterson as an office account; that Balch was president and treasurer; that Peterson was secretary and bookkeeper; that both were directors; that Mrs. Balch was not vested in business affairs; that she took no active part in the management

or operation of the corporation; that she had full faith, trust and confidence in the honesty and integrity of her husband; that the complete management and operation of the business was in Jack Balch; that he, knowing the trust and confidence reposed in him by his wife, undertook complete management and control of the business; that contrary to the trust reposed in him and with the connivance of Carl L. Peterson, Balch entered into a scheme and plan to cheat and defraud his wife out of her interest and rights in the corporation, and he, Balch planned and schemed to own the business exclusively; that the fraudulent scheme was to deplete the credits, assets and good will of the business in order that it would appear to be of little or no value, so that by manipulation he could become the sole owner; that on January 1, 1927 the corporation had a surplus of \$108,789.05 and was enjoying a profitable business; that an appraisal was had about that time of the machinery by expert appraisers who found it to be worth \$66,014.81; that Balch drew a salary of \$15,000 per year; that in pursuance of the scheme to defraud Mrs. Balch he, Balch, withdrew funds of large amounts in excess of his salary, which funds he appropriated to his own use; that Carl L. Peterson assisted and consented to these improper withdrawals of funds; that in 1927 Balch appropriated to his own use \$13,382.28 in excess of his salary of \$15,000 for that year and in excess of his credit balance at the beginning of that year of \$4,032.80; that in 1928 he appropriated to his own use \$16,536.55 in excess of his salary of \$15,000; that in 1929 he appropriated to his own use a further sum of \$21,773.26 in excess of his salary of \$15,000; that on December 31, 1929 he claimed to be the owner of an undivided one-third interest in a second mortgage on real estate located at 54th and Prairie Avenue, Chicago, and of an equity in 47 bonds of the Chicago Traction Company; that the equities "in both of these were of little or no value;" that Balch and Peterson well knew that these securities had little or no value; that nevertheless in furtherance of the conspiracy and fraud Balch transferred the securities to the corporation at a total value of \$17,650, which values were fictitious and fraudulent;



consolidated and fraud which transferred the securities to the corporation had little or no value; that nevertheless in furtherance of the Traction Company; that the securities "in both of these were of little value; that Balch and Peterson well knew that these securities interest in a second mortgage on real estate located at 83th and Prairie Avenue, Chicago, and of an equity in 47 bonds of the Chicago Traction Company; that Balch drew a salary of \$15,000 per year; that in furtherance of his credit balance at the beginning of that year of \$4,032.80; 13,382.28 in excess of his salary of \$15,000 for that year and in draws of funds; that in 1927 Balch appropriated to his own use that Balch drew a salary of \$15,000 per year; that in furtherance of the machinery by expert appraisers who found it to be worth \$22,014.81; able business; that an appraisal was had about that time of the the corporation had a surplus of \$106,732.08 and was enjoying a profit- manipulation he could become the sole owner; that on January 1, 1927 order that it would appear to be of little or no value, so that by was to deplete the credits, assets and good will of the business in and schemed to own the business exclusively; that the fraudulent scheme of her interest and rights in the corporation, and he, Balch planned Balch entered into a scheme and plan to cheat and defraud his wife out to the trust reposed in him and with the connivance of Carl L. Peterson, undertook complete management and control of the business; that contrary that he, knowing the trust and confidence reposed in him by his wife, complete management and operation of the business was in Jack Balch; confidence in the honesty and integrity of her husband; that the or operation of the corporation; that she had full faith, trust and

that Balch and Peterson thereupon opened an investment account on the books of the corporation and placed these securities to the credit of the corporation in that account; that on December 31, 1929, Balch caused his indebtedness as shown on the books of the corporation to be reduced by the sum of \$17,650, from \$51,692.19 to \$34,042.09; that in 1930 Balch appropriated to his own use \$6,653.55 over his salary of \$15,000; that on December 31, 1930 the books of the corporation showed an indebtedness from Balch of \$40,695.64; that in 1931 he appropriated to his own use \$5,407.47 in excess of his salary of \$15,000; that on December 31, 1931 the books of the corporation showed Balch's indebtedness to be \$46,103.11; that further funds were appropriated by him in 1932 and 1933; that Balch, with the approval, connivance and assistance of Peterson, further depleted the corporate assets by making large loans to his brothers Milton Balch and Lou L. Balch without security; that no repayments were ever made to the corporation on any of these accounts; that the corporation conducted a profitable business but failed to declare any dividends because of the manipulation of Balch with the connivance of Peterson; that in furtherance of the fraudulent scheme Balch and Peterson on December 31, 1934, without any repayment of the withdrawals and without any consideration being received by the corporation, charged off from the books of the corporation the entire indebtedness of Balch in the sum of \$47,546.25, and also charged off the indebtedness of his brothers Milton and Lou Balch without any payment to the corporation; that at that time these defendants also charged off on the books of the corporation the so-called investment of \$17,650; that by these manipulations the surplus account of the corporation was reduced from a credit balance of \$79,508.87 to a deficiency of \$32,277.31; that in furtherance of the schemes to defraud Mrs. Balch he, Balch, filed a petition in bankruptcy in which he scheduled his total indebtedness as \$53,831.77, which included the sum of \$47,546.25 due the corporation; that at the time of the filing of the petition in bankruptcy this indebtedness of



that Balch and Peterson thereupon opened an investment account on the books of the corporation and placed these securities to the credit of the corporation in that account; that on December 31, 1923, Balch caused his indebtedness as shown on the books of the corporation to be reduced by the sum of \$17,650, from \$51,692.19 to \$34,042.09; that in 1930 Balch appropriated to his own use \$6,653.55 over his salary of \$5,000; that on December 31, 1930 the books of the corporation showed an indebtedness from Balch of \$40,695.64; that in 1931 he appropriated to his own use \$5,407.47 in excess of his salary of \$5,000; that on December 31, 1931 the books of the corporation showed Balch's indebtedness to be \$46,103.11; that further funds were appropriated by him in 1932 and 1933; that Balch, with the approval, connivance and assistance of Peterson, further depleted the corporate assets by making large loans to his brothers Milton Balch and Lou L. Balch without security; that no repayments were ever made to the corporation on any of these accounts; that the corporation conducted a profitable business but failed to declare any dividends because of the manipulation of Balch with the connivance of Peterson; that in furtherance of the fraudulent scheme Balch and Peterson on December 31, 1934, without any repayment of the withdrawals and without any consideration being received by the corporation, charged off from the books of the corporation the entire indebtedness of Balch in the sum of \$47,546.58, and also charged off the indebtedness of his brothers Milton and Lou Balch without any payment to the corporation; that at that time these defendants also charged off on the books of the corporation the so-called investment of \$17,650; that by these manipulations the surplus account of the corporation was reduced from a credit balance of \$72,308.27 to a deficiency of \$2,277.31; that in furtherance of the scheme to defraud Mrs. Balch he, Balch, filed a petition in bankruptcy in which he scheduled his total indebtedness as \$52,851.77, which included the sum of \$47,546.58 due the corporation; that at the time of the filing of the petition in bankruptcy this indebtedness of

\$47,546.25 had already been by him charged off on the books of the corporation; that between January 1, 1935 and March 1, 1937 further funds totaling \$7,493.16 were appropriated by Balch to his own use and not repaid; that in 1936 Balch and Peterson arbitrarily reduced the value of the machinery and equipment on the books of the corporation from \$39,135.04 to \$25,000; that no appraisal was made by any competent person; that the sole purpose of the reduction was to further deplete the assets of the corporation so that such assets could be transferred to a new contemplated corporation known as D. & B. Manufacturing Co.; that on August 10, 1936, Balch, with the connivance of Peterson, M. J. Brown and Samuel Green, caused to be organized a corporation known as the D. & B. Manufacturing Co.; that the incorporators were the employees of the attorneys of Balch; that they had no financial interest in the corporation; that on August 11, 1937 all of the shares of capital stock were transferred to M. J. Brown and Samuel Green, who appear of record as the owners of all the shares of stock of the D. & B. Manufacturing Co.; that Brown and Green have no personal interest in the corporation or the stock and are mere dummies and agents for Balch; that Brown and Green have conspired with Balch to keep the record ownership of the stock in their names for the use and benefit of Balch; that Balch, Brown and Green concealed from Mrs. Balch the fact that the stock of the new corporation was owned by Jack H. Balch; that Brown and Green have never taken any part in the operation of the business; that they did not attend any meetings of the shareholders or of the directors; that they did not receive any dividends, although the business has been operating on a profitable basis; that from the date of the organization of the new corporation Balch has been its president and a director and has had the sole, full and complete charge of the management and control of the corporation; that Peterson was at all times the secretary and a director of the corporation, and aided, assisted and abetted Balch, Green and Brown to carry out the conspiracy; that to carry out the fraudulent scheme Balch and Peterson, as officers and majority directors of both



\$47,542.25 had already been by him charged off on the books of the corporation; that between January 1, 1935 and March 1, 1937 further funds totaling \$7,432.16 were appropriated by Balch to his own use and not repaid; that in 1936 Balch and Peterson arbitrarily reduced the value of the machinery and equipment on the books of the corporation from \$2,135.04 to \$22,000; that no appraisal was made by any competent person; that the sole purpose of the reduction was to further deplete the assets of the corporation so that such assets could be transferred to a new contemplated corporation known as D. & B. Manufacturing Co.; that on August 10, 1936, Balch, with the connivance of Peterson, M. J. Brown and Samuel Green, caused to be organized a corporation known as the D. & B. Manufacturing Co.; that the incorporators were the employees of the attorneys of Balch; that they had no financial interest in the corporation; that on August 11, 1937 all of the shares of capital stock were transferred to M. J. Brown and Samuel Green, who appear of record as the owners of all the shares of stock of the D. & B. Manufacturing Co.; that Brown and Green have no personal interest in the corporation or the stock and are mere nominees and agents for Balch; that Brown and Green have conspired with Balch to keep the record ownership of the stock in their names for the use and benefit of Balch; that Balch, Brown and Green concealed from Mrs. Balch the fact that the stock of the new corporation was owned by Jack H. Balch; that Brown and Green have never taken any part in the operation of the business; that they did not attend any meetings of the shareholders or of the directors; that they did not receive any dividends, although the business has been operating on a profitable basis; that from the date of the organization of the new corporation Balch has been its president and a director and has had the sole full and complete charge of the management and control of the corporation; that Peterson was at all times the secretary and a director of the corporation, and aided, assisted and abetted Balch, Green and Brown to carry out the conspiracy; that to carry out the fraudulent

Dalton & Balch, Inc. and D. & B. Manufacturing Co., on March 1, 1937 transferred and turned over to the D. & B. Manufacturing Co., all of the assets of Dalton & Balch, Inc., including machinery, inventory, accounts receivable and good will, excluding the indebtedness of Jack Balch, Milton Balch and Lou L. Balch; that the purported consideration for the transfer was \$3,350, and the assumption of liabilities of Dalton & Balch, Inc.; that this consideration was grossly inadequate and amounted to a fraud; that at that time the value of the machinery and equipment was \$39,135.04, less the reasonable reserve for depreciation; that the inventory of merchandise was in excess of \$20,000; that the accounts receivable were in excess of \$12,500; that the good will was valuable; that through these manipulations Mrs. Balch was deprived of her interest in the assets of Dalton & Balch, Inc.; that notwithstanding the transfer of the assets, business was carried on without interruption at the same place, with the same books, under the sole supervision of Balch, with the aid and assistance of Peterson; that Balch has continued ever since to operate the business as his own personal business, and did not render an accounting of his acts and doings to either Brown or Green, the purported stockholders; that as part of the scheme the corporation of Dalton & Balch, Inc. was not dissolved upon ceasing to do business, but was kept in apparent good standing with the Secretary of State for more than two years thereafter; that annual reports were filed with the Secretary of State; that the franchise fees were paid notwithstanding the fact that the corporation had supposedly ceased and was without assets or funds; that in 1938 the annual report of Dalton & Balch, Inc., was filed with the Secretary of State, but the franchise fee was not paid; that as a consequence the Attorney General filed an information and caused a decree to be entered dissolving the corporation; that Balch has been withdrawing large sums of money from the corporation over and above his salary; that he appropriated these sums to his own use; that he has at all times treated the business as his own personal business; that he will continue to persist in withdrawing funds and will dissipate the funds



continuous to remain in withdrawing funds and will dissipate the funds that he incorporated these sums to his own use; that he has at all times treated the business as his own personal business; that he will enter dissolving the corporation; that which has been withdrawing the money from the corporation over and above his salary; large sums of money from the corporation over and above his salary; the money which he had information and caused a decree to be of state, but the franchise fee was not paid; that as a consequence the annual report of Dalton & Balch, Inc., was filed with the secretary had supposedly ceased and was without assets or funds; that in 1938 franchise fees were paid notwithstanding the fact that the corporation that annual reports were filed with the secretary of state; that the standing with the secretary of state for more than two years thereafter; dissolved upon ceasing to do business, but was kept in apparent good part of the scheme the corporation of Dalton & Balch, Inc. was not belongs to either Brown or Green, the purported stockholders; that as personal business, and did not render an accounting of his acts and Balch has continued ever since to operate the business as his own supervision of Balch, with the aid and assistance of Peterson; that interruption at the same place, with the same books, under the sole standing the transfer of the assets, business was carried on without of her interest in the assets of Dalton & Balch, Inc.; that notwithstanding the assets, business was carried on without the accounts receivable were in excess of \$2,500; that the good will was valuable; that through these manipulations Mrs. Balch was deprived the inventory of merchandise was in excess of \$20,000; that and equipment was \$20,135.04, less the reasonable reserve for depreciation; that at that time the value of the machinery Dalton & Balch, Inc.; that this consideration was grossly inadequate for the transfer was \$3,350, and the assumption of liabilities of Balch, Milton Balch and Lou L. Balch; that the purported consideration account receivable and good will, excluding the indebtedness of Jack the assets of Dalton & Balch, Inc., including machinery, inventory, transferred and turned over to the L. & M. Manufacturing Co., all of Dalton & Balch, Inc. and D. & M. Manufacturing Co., on March 1, 1937

of the D. & B. Manufacturing Co., and appropriate the same to his own use; that he has threatened to liquidate the assets of the corporation and appropriate the proceeds to his own use; that she fears that unless a receiver is appointed to take charge of the affairs of the corporation Balch will carry out his threats and the business and assets of the corporation will be depleted and lost; that the estate of Olive E. Balch, deceased, has suffered the loss of large sums of money, the exact amount of which cannot be ascertained without an accounting under the direction of the court; that a trust should be impressed upon the defendants, D. & B. Manufacturing Co., Jack H. Balch, Carl L. Peterson, M. J. Brown and Samuel Green; that the shares of stock in the names of Brown and Green should be found in truth and in fact to be the shares of stock of plaintiff as administratrix of the estate of Olive E. Balch, deceased, and of Jack Balch, in the same proportion in which they owned the stock of Dalton & Balch, Inc.; that Brown and Green be compelled to transfer and deliver the certificates representing shares of stock in D. & B. Manufacturing Co., for cancellation under the direction of the court; that new certificates of stock be issued by the corporation to plaintiff and Jack H. Balch in their correct proportion; and that the shares of Balch be charged and encumbered with his indebtedness to the corporation for moneys wrongfully withdrawn and appropriated. She further alleged that she fears that in furtherance of the fraudulent scheme the defendants will cause transfers to be made of the certificates of stock to some persons unknown to the plaintiff for the purpose of placing such shares beyond the reach of the court, and that transfers will be made of such certificates by Brown and Green unless prevented by injunction. A second count of the complaint alleges that Mrs. Balch, at the time of her death, was the owner of considerable personal property consisting of jewelry, furniture, money, household furnishings, furs, clothing and personal effects; that shortly after her death Balch took possession of the property, appropriated it to his own use and sold a large portion of this property and appropriated the proceeds to his own use. In the



of the D. & B. Manufacturing Co., and appropriate the same to his own use; that he has threatened to liquidate the assets of the corporation and appropriate the proceeds to his own use; that she fears that unless a receiver is appointed to take charge of the affairs of the corporation Balch will carry out his threats and the business and assets of the corporation will be depleted and lost; that the estate of Olive E. Balch, deceased, has suffered the loss of large sums of money, the exact amount of which cannot be ascertained without an accounting under the direction of the court; that a trust should be imposed upon the defendants, D. & B. Manufacturing Co., Jack N. Balch, Carl L. Peterson, M. J. Brown and Samuel Green; that the shares of stock in the names of Brown and Green should be found in truth and in fact to be the shares of stock of plaintiff as administratrix of the estate of Olive E. Balch, deceased, and of Jack Balch, in the same proportion in which they owned the stock of Balton & Balch, Inc.; that Brown and Green be compelled to transfer and deliver the certificates representing shares of stock in D. & B. Manufacturing Co., for cancellation under the direction of the court; that new certificates of stock be issued by the corporation to plaintiff and Jack N. Balch in their correct proportion; and that the shares of Balch be charged and numbered with his indebtedness to the corporation for moneys wrongfully withdrawn and appropriated. She further alleged that she fears that in furtherance of the fraudulent scheme the defendants will cause transfers to be made of the certificates of stock to some persons unknown to the plaintiff for the purpose of placing such shares beyond the reach of the court, and that transfers will be made of such certificates by Brown and Green unless prevented by injunction. A second count of the complaint alleges that Mrs. Balch, at the time of her death, was the owner of considerable personal property consisting of jewelry, furniture, money, household furnishings, tools, clothing and personal effects; that shortly after her death Balch took possession of the property, appropriated it to his own use and sold a large portion of

second count she prayed for an accounting, that Balch be compelled to turn over and deliver to her all of the personal property in his possession and the proceeds of any sold; that in the alternative a judgment be entered against him for the value of the personal property or of the proceeds thereof, and that an injunction be entered restraining him and his agents from selling and disposing of any of the jewelry, furniture, moneys, household furnishings, furs, clothing and personal effects of Olive E. Balch, deceased.

On January 12, 1943 a special appearance was entered on behalf of Dalton & Balch, Inc., for the purpose of contesting the jurisdiction of the court over that defendant. This was accompanied by a written motion, which in turn was supported by an affidavit by Jack Balch. The motion and affidavit pointed out that the corporation was dissolved on May 1, 1939, pursuant to a decree of the Superior Court of Cook County; that all rights of action against the corporation, its officers and stockholders for any liability incurred previous to its dissolution were barred, not having been brought nor service of process had on or before May 1, 1941; and that the action was barred because it was not begun within five years after the cause of action accrued. On January 18, 1943 Milton H. Balch filed his appearance. The following day he filed a motion to strike the complaint. On January 12, 1943 Jack H. Balch, Dalton & Balch, Inc., Carl L. Peterson and M. J. Brown filed a written motion to dismiss the complaint on the ground that the cause of action did not accrue within the time limited by law and that the claim or demand set forth in the complaint had been released. These defendants supported their motion by an affidavit by Jack H. Balch. Therein he stated that he was president of Dalton & Balch, Inc., formerly a corporation; that the corporation was dissolved on May 1, 1939 by a decree of the Superior Court of Cook County; that the corporation does not any longer exist; that all rights of action against the corporation, its officers and stockholders for



second count she prayed for an accounting, that said be compelled to turn over and deliver to her all of the personal property in his possession and the proceeds of any sale; that in the alternative a judgment be entered against him for the value of the personal property or of the proceeds thereof, and that an injunction be entered restraining him and his agents from selling and disposing of any of the jewelry, furniture, money, household furnishings, cars, clothing and personal effects of Olive E. Welch, deceased.

On January 12, 1943 a special appearance was entered on behalf of Milton & Welch, Inc., for the purpose of contesting the jurisdiction of the court over that defendant. This was accomplished by a written motion, which in turn was supported by an affidavit by Jack Welch. The motion and affidavit pointed out that the corporation was dissolved on May 1, 1932, pursuant to a decree of the Superior Court of Cook County; that all rights of action against the corporation, its officers and stockholders for any liability incurred previous to its dissolution were barred, not having been brought nor service of process had on or before May 1, 1941; and that the action was barred because it was not begun within five years after the cause of action accrued. On January 12, 1943 Milton & Welch filed his appearance. The following day he filed a motion to strike the complaint. On January 12, 1943 Jack H. Welch, Milton & Welch, Inc., Carl L. Peterson and M. J. Brown filed a written motion to dismiss the complaint on the ground that the cause of action did not accrue within the time limited by law and that the claim or demand set forth in the complaint had been released. These defendants supported their motion by an affidavit by Jack H. Welch. Therein he stated that he was president of Milton & Welch, Inc., formerly a corporation; that the corporation was dissolved on May 1, 1932 by a decree of the Superior Court of Cook County; that the corporation does not any longer exist; that all rights of action against the corporation, its officers and stockholders for

any liability incurred previous to its dissolution were barred, no suit therefor having been brought or service of process had on or prior to May 1, 1941; that Dalton & Balch, Inc. ceased doing business on March 1, 1937; that it incurred no liabilities upon any civil action on or after that date; that the complaint filed cannot be maintained for the purpose of recovering possession of any personal property or damages or for the alleged detention or conversion thereof, unless such action was commenced within five years after such cause of action accrued; that all the alleged causes of action set forth in the complaint were on supposed unwritten contracts, expressed or implied, and were not commenced within five years after such cause or causes of action accrued; that M. J. Brown has at no time been a director or shareholder of Dalton & Balch, Inc.; that if any ~~xxx~~ liability on the part of any of the defendants at any time existed it was released by Olive E. Balch during her lifetime, who, with full knowledge of all the facts, consented and concurred in the transfer of the assets of Dalton & Balch, Inc., to the D. & B. Manufacturing Co.; that any supposed causes of action which Olive E. Balch or Dalton & Balch, Inc., had against Jack H. Balch or against any of the defendants was released and discharged and is barred by the discharge of Jack H. Balch in the bankruptcy proceedings mentioned in the complaint; that Olive E. Balch had full knowledge and notice in her lifetime of the bankruptcy proceedings; that the bankruptcy proceedings were had with the full knowledge, concurrence and consent of Olive E. Balch; that Olive E. Balch knowingly and understandingly consented and concurred in the reduction of the appraised value of the machinery, that the reduction was properly made and was made to the amount which at the time of such reduction represented the legitimate and real value of the machinery.

On February 3, 1943 the court entered the following injunctonal order, based on the verified complaint:



any liability incurred previous to its dissolution were barred, no suit thereafter having been brought or service of process had on or prior to May 1, 1941; that Dalton & Balch, Inc. ceased doing business on March 1, 1937; that it incurred no liabilities upon any civil action on or after that date; that the complaint filed cannot be maintained for the purpose of recovering possession of any personal property or damages or for the alleged detention or conversion thereof, unless such action was commenced within five years after such cause of action accrued; that all the alleged causes of action set forth in the complaint were on supposed unwritten contracts, expressed or implied, and were not commenced within five years after such cause of action accrued; that M. J. Brown has at no time been a director or shareholder of Dalton & Balch, Inc.; that if any tax liability on the part of any of the defendants at any time existed it was released by Olive E. Balch during her lifetime, who, with full knowledge of all the facts, consented and concurred in the transfer of the assets of Dalton & Balch, Inc., to the M. & B. Manufacturing Co.; that any supposed causes of action which Olive E. Balch or Dalton & Balch, Inc., had against Jack W. Balch or against any of the defendants was released and discharged and is barred by the discharge of Jack W. Balch in the bankruptcy proceedings mentioned in the complaint; that Olive E. Balch had full knowledge and notice in her lifetime of the bankruptcy proceedings; that the bankruptcy proceedings were had with the full knowledge, concurrence and consent of Olive E. Balch; that Olive E. Balch knowingly and understandingly consented and concurred in the reduction of the appraised value of the machinery, that the reduction was properly made and was made to the amount which at the time of such reduction represented the legitimate and real value of the machinery.

On February 2, 1943 the court entered the following injunctive order, based on the verified complaint:

"That a writ of injunction be issued in the above entitled cause by the clerk of this court, restraining and enjoining the defendants and each of them, their respective officers, agents, employees, servants and attorneys, from in any manner transferring, controlling or disposing of any of the assets of the defendant D. & B. Manufacturing Co., a corporation, except in the ordinary and usual course of business, and enjoining and restraining the defendants M. J. Brown and Samuel Green from transferring, selling, assigning or disposing of any of the certificates of stock or any of the shares of stock now issued in their names and outstanding on the books of said D. & B. Manufacturing Co., and restraining and enjoining the said defendants D. & B. Manufacturing Co., its agents, officers, directors, employees, servants and attorneys from honoring, accepting and transferring on the books of said corporation any such attempted transfer or assignment of any of its shares of capital stock now outstanding until the further order of the court. That, for good cause shown, said injunction issue without bond."

On the same day, February 3, 1943, the court denied the motion of Jack Balch, D. & B. Manufacturing Co., a corporation, Carl L. Peterson and M. J. Brown to dismiss the complaint and ordered that the defendants answer the bill within 15 days. On February 5, 1943 plaintiff's motion for the appointment of a receiver was continued to February 15, 1943.

On February 13, 1943 defendants filed their answer and counterclaim. Jack Balch swore that he read the answer and counterclaim and that "such answer and counterclaim are true in substance and in fact." The answer and counterclaim are quite voluminous, taking up 44 pages. The defendants deny each and every allegation of fraud, conspiracy or inequitable conduct and affirmatively plead (1) that whatever claim is alleged in the complaint took place in and prior to 1937 and was barred by the five year statute of limitations; (2) that Dalton & Balch, Inc., was dissolved by a decree of the Superior Court of Cook County on May 1, 1939, and by virtue of the Illinois statute no action may be brought against said corporation after a lapse of two years from the date of its dissolution; (3) that Olive E. Balch, whose rights are asserted in the complaint, was a director of Dalton & Balch, Inc., and at all times knew and consented to the conduct of defendants with regard to the corporation; and (4) that the claim asserted in the complaint was presented to the Probate



"That a writ of injunction be issued in the above entitled cause by the clerk of this court, restraining and enjoining the defendants and each of them, their respective officers, agents, employees, servants and attorneys, from in any manner transferring, controlling or disposing of any of the assets of the defendant D. & B. Manufacturing Co., a corporation, except in the ordinary and usual course of business, and enjoining and restraining the defendants M. J. Brown and Samuel Green from transferring, selling, assigning or disposing of any of the certificates of stock or any of the shares of stock now issued in their names and outstanding on the books of said D. & B. Manufacturing Co., and restraining and enjoining the said defendants D. & B. Manufacturing Co., its agents, officers, directors, employees, servants and attorneys from honoring, accepting and transferring on the books of said corporation any such attempted transfer or assignment of any of its shares of capital stock now outstanding until the further order of the court. That, for good cause shown, said injunction issue without bond."

On the same day, February 5, 1943, the court denied the motion of Jack Balch, D. & B. Manufacturing Co., a corporation, Carl L. Peterson

and M. J. Brown to dismiss the complaint and ordered that the defendants answer the bill within 15 days. On February 8, 1943 plain-

tiff's motion for the appointment of a receiver was continued to

February 16, 1943.

On February 16, 1943 defendants filed their answer and

counterclaim. Jack Balch avers that he read the answer and counter-

claim and that "such answer and counterclaim are true in substance

and in fact." The answer and counterclaim are quite voluminous,

taking up 44 pages. The defendants deny each and every allegation of

fraud, conspiracy or inequitable conduct and affirmatively plead (1)

that whatever claim is alleged in the complaint took place in and

prior to 1937 and was barred by the five year statute of limitations;

(2) that Balch & Balch, Inc., was dissolved by a decree of the

Superior Court of Cook County on May 1, 1939, and by virtue of the

Illinois statute no action may be brought against said corporation

after a lapse of two years from the date of its dissolution; (3)

that Olive L. Balch, whose rights are asserted in the complaint, was a

director of Balch & Balch, Inc., and at all times knew and consented

to the conduct of defendants with regard to the corporation; and (4)

that the claim asserted in the complaint was presented to the Probate

Court of Cook County and that court, after hearing evidence thereon, dismissed such claim. The counterclaim filed on behalf of Jack Balch against plaintiff in her individual capacity alleged that on or about March 20, 1924 Darline Moss, then known as Darline Balch, was a minor; that he, Jack Balch, was then appointed by the Probate Court of Cook County as her guardian; that in January, 1937 he, Jack Balch, after due notice to plaintiff, filed his final report and account as such guardian in the Probate Court, which account and report showed that said Darline Moss was then indebted to him in the sum of \$2,578.92; that the Probate Court on January 5, 1937 approved the report and account and thereby adjudged that Darline Moss was then indebted to him in the sum of \$2,578.92, no part of which has been paid to him; and he asked judgment against Darline Moss for \$2,578.92 and interest thereon from January 5, 1937. On the same day the answer was filed, the then attorney for defendants served on the attorneys for plaintiff a notice that on February 15, 1943 at the opening of court in the forenoon he would present the motion of defendants to dissolve the injunction. With the notice served on February 13, 1943, he also served a copy of a motion to dissolve the injunction. The motion to dissolve the injunction was filed on the same day as the answer, namely, February 13, 1943. In their motion defendants urge the following grounds for dissolving the injunction:

"1. There is no equity on the face of the said bill. 2. The material allegations of said bill are denied by the defendants' answer and affidavits filed therewith. 3. That, as shown by said answer, the said Dalton & Balch, Inc. was dissolved on the 1st day of May, 1939, by decree of the Superior Court of Cook County aforesaid, entered in case Gen. No. 108350, and does not any longer exist and has not existed for a period of more than two years next prior to the filing of the complaint in this cause. 4. For the reason, as shown by the said answer, the cause or causes of action alleged in the complaint, if any existed, did not accrue within five years next prior to the commencement of the suit herein filed. 5. No bond was required of the plaintiff before the entry of the order of injunction as required by statute and the plaintiff did not show any good cause for excusing the filing of such bond. 6. Other reasons."

On February 15, 1943 an order was entered on motion of solicitors for plaintiff, referring the cause to a master in chancery to take evidence and report his conclusions of law and fact. On the same day, February 15, 1943, the following order was entered:



and report his conclusions of law and fact. On the same day, Plaintiff, retaining the cause to a master in chancery to take evidence on February 15, 1943 an order was entered on motion of solicitors for Plaintiff, and the cause was set for trial on the same day.

On February 15, 1943 an order was entered on motion of solicitors for Plaintiff, retaining the cause to a master in chancery to take evidence on February 15, 1943 an order was entered on motion of solicitors for Plaintiff, and the cause was set for trial on the same day.

1. There is no equity on the face of the said bill. 2. The material allegations of said bill are denied by the defendants, answer and affidavits filed therewith. 3. That, as shown by said answer, the said William B. Baker, Inc. was dissolved on the last day of May, 1939, by decree of the Superior Court of Cook County aforesaid, entered in case No. 108330, and does not any longer exist and has not existed for a period of more than two years next prior to the filing of the complaint in this cause. 4. For the reasons, as shown by the said answer, the cause or causes of action alleged in the complaint, if any existed, did not accrue within five years next prior to the commencement of the suit herein filed. 5. No bond was required of the Plaintiff before the entry of the order of injunction as required by statute and the Plaintiff did not show any good cause for obtaining the filing of such bond. 6. Other reasons."

following grounds for dissolving the injunction:

namely, February 13, 1943. In their motion defendants urge the dissolve the injunction was filed on the same day as the answer, served a copy of a motion to dissolve the injunction. The motion to injunction. With the notice served on February 13, 1943, he also forenoon he would present the motion of defendants to dissolve the a notice that on February 13, 1943 at the opening of court in the the then attorney for defendants served on the attorneys for Plaintiff thereon from January 6, 1937. On the same day the answer was filed, and he asked judgment against Darline Moss for \$2,578.92 and interest him in the sum of \$2,578.92, no part of which has been paid to him; account and thereby adjudged that Darline Moss was then indebted to that the Probate Court on January 6, 1937 approved the report and said Darline Moss was then indebted to him in the sum of \$2,578.92; guardian in the Probate Court, which account and report showed that due notice to Plaintiff, filed his final report and account as such County as her guardian; that in January, 1937 he, Jack Wilson, after that he, Jack Wilson, was then appointed by the Probate Court of Cook March 30, 1934 Darline Moss, then known as Darline Wilson, was a minor; against Plaintiff in her individual capacity alleged that on or about dismissal such alias. The counterclaim filed on behalf of Jack Wilson Court of Cook County and that count, the hearing evidence thereon,

"On motion of Jacob G. Grossberg, solicitor for certain defendants, to dissolve the injunction heretofore issued, upon the coming in of the answer of such defendants be dissolved, and the court having considered the complaint, answer and motion to dissolve such injunction, it is ordered that said motion to dissolve the injunction be and the same is hereby denied."

On February 17, 1943 James V. Sallemi was appointed "temporary receiver of the business and all of the assets, accounts, securities, evidences of indebtedness, moneys, goods, receivables, contracts, records, corporate books, books of account, rents, issues and profits and any and all property and effects belonging to D. & B. Manufacturing Co., a corporation, and said Dalton & Balch, Inc., a corporation, and both of them." The order required the receiver to give bond in the sum of \$5,000, and further recited:

"That it appearing to this court, after notice to the defendants, Jack H. Balch, Dalton & Balch, Inc., a corporation, and D. & B. Manufacturing Co., a corporation, Carl L. Peterson and M. J. Brown and full hearing, that a receiver ought to be appointed without any bond being given by plaintiff to defendants, no bond need be executed by plaintiff as a condition to the appointment of a receiver."

On the same day the receiver gave bond. On February 18, 1943 the court entered a second injunction restraining Jack H. Balch and the other defendants from doing the acts referred to in the order of February 3, 1943. This order recited that the matter coming on for hearing on the motion of plaintiff for a temporary injunction, based on the verified complaint, the answer of certain defendants, and it appearing to the court that in the proceedings lately pending in the Probate Court of Cook County, in the matter of the Estate of Olive E. Balch, deceased, the defendant M. J. Brown was sworn and testified as a witness, and that the testimony of said Brown was taken down in shorthand by a court reporter and transcribed, the transcript of such testimony being produced in open court and the court having heard part of the testimony of Brown as it appears in the transcript, and having heard the arguments of counsel, ordered that a writ of injunction issue "restraining and enjoining the defendants and each of them, their respective officers, agents, employees, servants and attorneys, from in any manner transferring, controlling or disposing of any of the assets of the defendant D. & B. Manufacturing Co., a corporation, or



"On motion of Jacob G. Orsberg, solicitor for certain defendants, to dissolve the injunction heretofore issued, upon the coming in of the answer of such defendants be dissolved, and the court having considered the complaint, answer and motion to dissolve such injunction, it is ordered that said motion to dissolve the injunction be and the same is hereby denied."

On February 17, 1943 James V. Galiani was appointed "temporary receiver of the business and all of the assets, accounts, securities, evidences of indebtedness, money, goods, receivables, contracts, records, corporate books, books of account, rents, leases and profits and any and all property and effects belonging to D. & H. Manufacturing Co., a corporation, and said Dalton & Balch, Inc., a corporation, and both of them." The order required the receiver to give bond in the sum of \$5,000, and further recited:

"That it appearing to this court, after notice to the defendants, Jack H. Balch, Dalton & Balch, Inc., a corporation, and D. & H. Manufacturing Co., a corporation, Carl L. Peterson and M. J. Brown and full hearing, that a receiver ought to be appointed without any bond being given by plaintiff to defendants, no bond need be executed by plaintiff as a condition to the appointment of a receiver."

On the same day the receiver gave bond. On February 18, 1943 the court entered a second injunction restraining Jack H. Balch and the other defendants from doing the acts referred to in the order of February 3, 1943. This order recited that the matter coming on for hearing on the motion of plaintiff for a temporary injunction, based on the verified complaint, the answer of certain defendants, and its appearing to the court that in the proceedings lately pending in the Probate Court of Cook County, in the matter of the estate of Olive E. Balch, deceased, the defendant M. J. Brown was sworn and testified as a witness, and that the testimony of said Brown was taken down in shorthand by a court reporter and transcribed, the transcript of such testimony being produced in open court and the court having heard part of the testimony of Brown as it appears in the transcript, and having heard the arguments of counsel, ordered that a writ of injunction issue restraining and enjoining the defendants and each of them, their respective officers, agents, employees, servants and attorneys, from in any manner transferring, controlling or disposing of any of the

any of the assets of the business of said defendant Jack H. Balch, claimed by him to have been acquired from said D. & B. Manufacturing Co., a corporation, on or about December 15, 1942, and enjoining and restraining the defendants, Jack H. Balch, M. J. Brown and Samuel Green, or any of them, from transferring, selling, assigning or disposing of any of the certificates of stock or any of the shares of stock now issued in their names and outstanding on the books of said D. & B. Manufacturing Co., and restraining and enjoining the said defendant D. & B. Manufacturing Co., its agents, officers, directors, employees, servants and attorneys from honoring and transferring on the books of said corporation any such attempted transfer or assignment of any of its shares of capital stock now outstanding until the further order of the court. That, for good cause shown, said injunction issue without bond."

On February 18, 1943 the court entered a second order appointing a receiver for Jack H. Balch as well as the other corporate defendants. The recitations in this order are similar to the recitations in the order for the injunction. On February 19, 1943 the court amended the receivership order of February 18, 1943 by inserting the following:

"On motion of the court, counsel for both parties being present in court, it is ordered by the court that the order appointing the receiver herein entered on the 18th day of February, A. D. 1943 be and the same is hereby amended so as to insert after paragraph Number 1 of Page 2 of said order the following: That said receiver shall not take over the actual mechanical operation of said business but is to oversee same to the extent that all assets are conserved pending the final hearing of this cause, and that the present management in charge of the mechanical operation of said business continue until the further order of court."

On February 25, 1943 the defendants filed their written motions to dissolve the injunctions and to vacate the orders appointing the receiver. The grounds urged as a basis for these motions are: (1) there is no equity on the face of said bill; (2) the material allegations of said bill are denied by the defendants' answer and the affidavits filed therewith; (3) that as shown by said answer, the said Dalton & Balch, Inc., was dissolved on the 1st day of May, 1939,



any of the assets of the business of said defendant Jack H. Belch, obtained by him to have been received from said D. & B. Manufacturing Co., a corporation, on or about December 15, 1942, and enjoining and restraining the defendants, Jack H. Belch, W. J. Brown and Samuel Green, or any of them, from transferring, selling, assigning or disposing of any of the certificates of stock or any of the shares of stock now issued in their names and outstanding on the books of said D. & B. Manufacturing Co., and restraining and enjoining the said defendant D. & B. Manufacturing Co., its agents, officers, directors, employees, servants and attorneys from honoring and transferring on the books of said corporation any such attempted transfer or assignment of any of its shares of capital stock now outstanding until the further order of the court. That, for good cause shown, said injunction issues without bond."

On February 18, 1943 the court entered a second order appointing a receiver for Jack H. Belch as well as the other corporate defendants. The restrictions in this order are similar to the restrictions in the order for the injunction. On February 19, 1943 the court amended the receivership order of February 18, 1943 by inserting the following:

"On motion of the court, counsel for both parties being present in court, it is ordered by the court that the order appointing the receiver herein entered on the 18th day of February, A. D. 1943 be and the same is hereby amended so as to insert after paragraph Number 1 of Page 2 of said order the following: That said receiver shall not take over the actual mechanical operation of said business but is to oversee same to the extent that all assets are conserved pending the final hearing of this cause, and that the present management in charge of the mechanical operation of said business continue until the further order of court."

On February 25, 1943 the defendants filed their written motions to dissolve the injunctions and to vacate the orders appointing the receiver. The grounds urged as a basis for these motions are: (1) there is no equity on the face of said bill; (2) the material allegations of said bill are denied by the defendants; answer and the affirmative filed therewith; (3) that as shown by said answer, the said Belch & Belch, Inc., was dissolved on the 1st day of May, 1938,

by decree of the Superior Court of Cook County aforesaid, entered in case Gen. No. 108350, and does not any longer exist and has not existed for a period of more than two years next prior to the filing of the complaint in this cause, and this court has not jurisdiction of said dissolved corporation and of the cause and causes of action based on transactions of and concerning and in connection with such dissolved corporation; (4) for the reason, as shown by the said answer, the cause or causes of action alleged in the complaint, if any existed, did not accrue within five years next prior to the commencement of the suit herein filed; (5) no bond was required of the plaintiff before the entry of either order of injunction as required by statute and the plaintiff failed to file such bond and the plaintiff did not show any good cause for excusing the filing of such bond; (6) the sworn answer herein filed conclusively refutes any and all charges of fraud in the complaint; (7) the charges of fraud in said complaint are general and are merely the pleader's conclusions and state no specific act or acts of fraud; (8) the order of injunction herein entered on the 3rd day of February, 1943, is superseded by the order of injunction herein entered on the 18th day of February 18, 1943, and is functus officio; (9) The estate of the said Olive E. Balch, deceased, is in process of administration in the Probate Court of Cook County, which has exclusive jurisdiction of the subject matter of this suit; and (10) other reasons, appearing on the face of the complaint and of the sworn answer. The motion to vacate the order appointing the receiver is based on similar grounds, the only change being that the fifth ground recites no bond was required of the plaintiff before the entry of the order appointing the receiver, and plaintiff did not show any good cause for excusing the filing of a bond. On March 2, 1943 the court denied the motions of the defendants to dissolve the injunctions and to vacate the orders appointing the receiver. The report of proceedings shows that at a hearing on February 3, 1943 one of the attorneys for plaintiff, in support



by decree of the Superior Court of Cook County, Illinois, entered in Case No. 108380, and does not any longer exist and has not existed for a period of more than two years next prior to the filing of the complaint in this cause, and this court has not jurisdiction of said dissolved corporation and of the cause and cause of action based on transactions of and concerning and in connection with such dissolved corporation; (4) for the reason, as shown by the said answer, the cause or causes of action alleged in the complaint, if any existed, did not accrue within five years next prior to the commencement of the suit herein filed; (5) no bond was required of the plaintiff before the entry of either order of injunction as required by statute and the plaintiff failed to file such bond and the plaintiff did not show any good cause for excusing the filing of such bond; (6) the sworn answer herein filed conclusively refutes any and all charges of fraud in the complaint; (7) the charges of fraud in said complaint are general and are merely the pleader's conclusions and state no specific act or acts of fraud; (8) the order of injunction herein entered on the 5th day of February, 1943, is superseded by the order of injunction herein entered on the 18th day of February 18, 1943, and is functus officio; (9) the estate of the said Olive L. Welch, deceased, is in process of administration in the Probate Court of Cook County, which has exclusive jurisdiction of the subject matter of this suit; and (10) other reasons, appearing on the face of the complaint and of the sworn answer. The motion to vacate the order appointing the receiver is based on similar grounds, the only change being that the fifth ground recites no bond was required of the plaintiff before the entry of the order appointing the receiver, and plaintiff did not show any good cause for excusing the filing of a bond. On March 2, 1943 the court denied the motions of the defendants to dissolve the injunctions and to vacate the orders appointing the receiver. The record of proceedings shows that at a hearing on February 2, 1943 one of the attorneys for plaintiff, in support

of plaintiff's motions for an injunction and for the appointment of a receiver, read to the court part of the testimony of M. J. Brown from a transcript of such testimony taken before the Probate Court of Cook County in the matter of the Estate of Olive E. Balch, deceased. This transcript shows that in the Probate Court Mr. Brown testified that he was a certified public accountant with offices in Chicago; that he met Jack Balch in 1933; that he was an auditor for Mr. Balch's brother, Lou Balch; that he, witness, received stock in the D. & B. Manufacturing Co., in 1937; that he still possesses it; that the stock was given to him through the good offices of Lou Balch, who promoted the deal for him; that he received the stock for no other reason than as security for money he loaned to Jack Balch; that he gave Lou Balch \$1,000; that Lou Balch then stated that he would require about \$3,000; that witness first gave Lou Balch \$1,000 in 1935; that he returned the \$1,000 in 1937; that witness then made another loan of \$1,000 to Lou Balch; that Lou Balch repaid \$300 on this loan, which left a balance of \$1,700; that Lou Balch told him that the money was for his brother, Jack Balch; that Jack Balch came to see witness the next day and told him that Lou had given him the money; that the money was intended to be a loan to Jack Balch; that witness did not ask for security; that the security was forced on him; that as security for the loan witness was holding 25 and a fraction shares of stock; that witness knew Sam Green, having met him in 1936; that he met him twice since then; that witness had nothing to do with the corporation and did not talk about the business of the corporation with Green; that he knew Green had some money in it; that witness did not know whether Green made a loan to Jack Balch, but was "pretty sure" that Green made a loan to Jack Balch about the same time witness made a loan; that \$3,500 or \$4,000 was needed; that witness was to put in one-half and some other person was to put in the other one-half; that witness did not ask for any security; that witness assumed Green was in Chicago for



of Plaintiff's motion for an injunction and for the appointment of a receiver, read to the court part of the testimony of M. L. Brown from a transcript of such testimony taken before the Probate Court of Cook County in the matter of the estate of Olive L. Balch, deceased. This transcript shows that in the Probate Court Mr. Brown testified that he was a certified public accountant with offices in Chicago; that he met Jack Balch in 1935; that he was an auditor for Mr. Balch's brother, Lou Balch; that he, witness, received stock in the M. & B. Manufacturing Co., in 1937; that he still possesses it; that the stock was given to him through the good offices of Lou Balch, who promoted the deal for him; that he received the stock for no other reason than as security for money he loaned to Jack Balch; that he gave Lou Balch \$1,000; that Lou Balch then stated that he would repurchase about \$3,000; that witness first gave Lou Balch \$1,000 in 1935; that he returned the \$1,000 in 1937; that witness then made another loan of \$1,000 to Lou Balch; that Lou Balch repaid \$300 on this loan, which left a balance of \$1,700; that Lou Balch told him that the money was for his brother, Jack Balch; that Jack Balch came to see witness the next day and told him that Lou had given him the money; that the money was intended to be a loan to Jack Balch; that witness did not ask for security; that the security was forced on him; that as security for the loan witness was holding \$2 and a fraction shares of stock; that witness knew Sam Green, having met him in 1936; that he met him twice since then; that witness had nothing to do with the corporation and did not talk about the business of the corporation with Green; that he knew Green had some money in it; that witness did not know whether Green made a loan to Jack Balch, but was "pretty sure" that Green made a loan to Jack Balch about the same time witness made a loan; that \$5,000 or \$4,000 was needed; that witness was to put in one-half and some other person was to put in the other one-half; that witness did not ask for any security; that witness assumed Green was in Chicago for

the purpose of loaning money to Jack Balch; that Green is an attorney; that witness does not have a note representing the loan; that the loan was paid in cash; that the fact that the money was a loan was never discussed by witness in Jack Balch's presence; that the transactions were entirely with Lou Balch; that he never attended any of the meetings of the directors of the D. & B. Manufacturing Co.; that he did not know whether he was a director of the corporation; that he was an officer of the corporation but did not know what office he held. Witness later admitted signing certain minutes of the corporation. The court further certified "that upon the hearing of the motion for injunction Jacob G. Grossberg, attorney for certain defendants, appeared and argued on behalf of said defendants, resisting said motion for injunction; that the defendant Jack H. Balch was personally present in court; that at no time during said proceeding did said attorney or said defendant make mention of the fact that said Jack Balch had acquired the shares of stock of the defendant, D. & B. Manufacturing Co., a corporation, issued to M. J. Brown and Samuel Green, and neither was it mentioned or stated in any manner directly or indirectly that the said corporation had been dissolved at any time theretofore. Said motion for injunction was heard by said court on January 12, 1943 and February 3, 1943. On the same date this matter was postponed in order to give the attorneys for the parties an opportunity to agree upon some person to act as receiver; that at the further hearing of this matter on the 17th day of February, counsel for both sides appeared in court, and the defendant Jack H. Balch was personally in court and said attorneys represented to the court that no agreement could be reached as to the person to be appointed receiver. That the matter was then again submitted to the court and said counsel for defendants failed to inform the court of the fact that the defendant Jack H. Balch had acquired the stock of defendants, M. J. Brown and Samuel Green, in said D. & B. Manufacturing Co., a corporation, and that said corporation had theretofore been dissolved; that the court on said 17th day of February, 1943, thereupon appointed a receiver; that although the defendant had filed an answer to the



a receiver; that although the defendant had filed an answer to the corporation, and the said corporation had therefore been dissolved; M. J. Brown and Samuel Green, in said D. B. Manufacturing Co., a corporation, had secured the stock of defendant Jack H. Balch had secured the stock of defendant, said counsel for defendant failed to inform the court of the fact receiver. That the matter was then again submitted to the court and court that no agreement could be reached as to the person to be appointed Balch was personally in court and said attorneys represented to the counsel for both sides appeared in court, and the defendant Jack H. that at the further hearing of this matter on the 17th day of February, the parties an opportunity to agree upon some person to act as receiver; same date this matter was postponed in order to give the attorneys for heard by said court on January 12, 1943 and February 3, 1943. On the been dissolved at any time thereafter. Said motion for injunction was in any manner directly or indirectly that the said corporation had to M. J. Brown and Samuel Green, and neither was it mentioned or stated stock of the defendant, D. B. Manufacturing Co., a corporation, issued mention of the fact that said Jack Balch had acquired the shares of time during said proceeding did said attorney or said defendant make defendant Jack H. Balch was personally present in court; that at no of said defendant, resisting said motion for injunction; that the Grossberg, attorney for certain defendants, appeared and argued on behalf certified "that upon the hearing of the motion for injunction Jacob G. admitted signing certain minutes of the corporation. The court further of the corporation but did not know what office he held. Witness later know whether he was a director of the corporation; that he was an officer of the directors of the D. B. Manufacturing Co.; that he did not were entirely with Lou Balch; that he never attended any of the meetings discussed by witness in Jack Balch's presence; that the transactions was paid in cash; that the fact that the money was a loan was never that witness does not have a note representing the loan; that the loan the purpose of loaning money to Jack Balch; that Green is an attorney;

complaint, consisting of 44 pages, on the 13th day of February, 1943, no copy of the same was served upon the plaintiff or her attorneys; that on the 19th day of February, 1943, when said cause again came before the court, counsel for defendants handed a copy of the answer to the court without in any manner informing the court or pointing out that the said answer contained the averments that said Jack H. Balch had acquired the shares of stock aforementioned from defendants Green and Brown and that said corporation had been previously dissolved. Said Jacob G. Grossberg, as attorney for certain defendants, at all times objected to the applications for injunction and receiver." The defendants appeal from the orders granting the injunctions and appointing a receiver and from the orders overruling their motions to dissolve the injunctions and to vacate the appointment of the receiver.

The first point urged by defendants is that plaintiff admits as a matter of law that the claim alleged in the complaint took place in and prior to 1937 and is barred by the five year statute of limitations. Plaintiff contends that the transactions continued until January 4, 1943, and insists that the entire transaction must be viewed as a series of fraudulent acts and a conspiracy culminating in the final accomplishment of the purpose on January 4, 1943, when Balch had the stock returned to him by Green and Brown and when he dissolved the corporation and acquired all the business as his own. Defendants filed motions to dismiss under Section 48 of the Civil Practice Act on the ground that the causes of action, if any, alleged in the complaint were barred by the statute of limitations and supported these motions by affidavits. Plaintiff filed no objections or counter-affidavits. Defendant argues that by virtue of this, plaintiff admitted the facts stated in his affidavits. Plaintiff asserts that the statute of limitations does not apply in equity and that the doctrine of laches is applicable, citing Duncan v. Dazey, 318 Ill. 500. [ It is clear that plaintiff's claim is based on allegations of a constructive trust. In Illinois the doctrine of laches is applicable to an express trust, but that as to a constructive trust the statute of limitations is



complaint, consisting of 44 pages, on the 18th day of February, 1945, no copy of the same was served upon the plaintiff or her attorneys; that on the 18th day of February, 1945, when said cause came again before the court, counsel for defendants handed a copy of the answer to the court without in any manner informing the court or pointing out that the said answer contained the averments that said Jack H. Balch had acquired the shares of stock aforementioned from defendants Green and Brown and that said corporation had been previously dissolved. Said Jacob G. Greenberg, as attorney for certain defendants, at all times objected to the applications for injunction and receiver. The defendants appeal from the orders granting the injunctions and appointing a receiver and from the orders overruling their motions to dissolve the injunctions and to vacate the appointment of the receiver. The first point urged by defendants is that plaintiff admits as a matter of law that the claim alleged in the complaint took place on and prior to 1937 and is barred by the five year statute of limitations. Plaintiff contends that the transactions continued until January 4, 1945, and insists that the entire transaction must be viewed as a series of fraudulent acts and a conspiracy culminating in the final accomplishment of the purpose on January 4, 1945, when Balch had the stock returned to him by Green and Brown and when he dissolved the corporation and acquired all the business as his own. Defendants filed motions to dismiss under Section 48 of the Civil Practice Act on the ground that the cause of action, if any, alleged in the complaint were barred by the statute of limitations and supported these motions by affidavits. Plaintiff filed no objections or counter-affidavits. Defendant argues that by virtue of this, plaintiff admitted the facts stated in his affidavits. Plaintiff asserts that the statute of limitations does not apply in equity and that the doctrine of laches is applicable, citing Dunham v. Barry, 318 Ill. 500. It is clear that plaintiff's claim is based on allegations of a constructive trust. In Illinois the doctrine of laches is applicable to an express trust, that as to a constructive trust the statute of limitations is

applicable. In Quayle et al. v. Guild, 91 Ill. 378, our Supreme Court said (384):

"In Albretch v. Wolf, 58 Ill. 186, this court held the following language: 'In Farnam v. Brooks, 9 Pick. 212, it was held that the Statute of Limitations does not apply to direct trusts created by deed or will, and perhaps not to those created by appointment of law, such as executorships and administrations; but constructive trusts, resulting from partnerships, agencies, and the like, are subject to the statute. The doctrine of that case is supported by good authority. Walker v. Walker, 16 Serg. & Raw. 379; Kane v. Bloodgood, 7 Johns. Ch. 90; Merwin v. Titworth, 18 B. Mon. 582.' Wilhelm v. Caylor, 32 Md. 151, is an authority to the point, that the rule with respect to the bar of the Statute of Limitations is equally applicable in the case of a bill for an account by one partner against another, as in other cases of a bill for an account; and see Weisman v. Smith, 6 Jones' Eq. Rep. 124. The trust here claimed we regard as but a constructive trust, and so subject to the Statute of Limitations."

We are of the opinion that in the state of the pleadings the court erred in granting the injunction and in appointing a receiver without determining the merits of the respective contentions. Defendants also point out that Dalton & Balch, Inc., was dissolved by a decree of the Superior Court of Cook County on May 1, 1939, and that therefore no action can be brought against that corporation, its directors or shareholders after a lapse of two years from the date of its dissolution. (Sec. 157.94, Sec. 32, Ill. Rev. Stat. 1941). It is admitted that this corporation was dissolved on May 1, 1939 and that more than two years elapsed after such dissolution before the instant action was commenced. At this time it is ~~unnecessary~~ unnecessary for us to pass on this point.

The third point advanced by defendants is that plaintiff admits as a matter of law that Olive E. Balch was a director and knew and consented to the conduct of defendants with regard to the property involved. The motion to dismiss, supported by an affidavit, and the answer to which no reply or counter-affidavit was filed, stated a complete defense, and if the allegations of the answer are true, plaintiff cannot secure any part of the relief she seeks. Plaintiff states that a reply to the answer appears in the additional record. Apparently, a reply was filed by plaintiff after the defendants appealed. We declined to allow plaintiff to file an additional record showing the contents of the reply. This is a court of review and we



applied to. In May's et al. v. United States, 371 U.S. 428, 63 S.Ct. 455, 4 L.Ed.2d 581, 1962, our Supreme

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subject to the Statute of Limitations." Trusts here claimed we regard as but a constructive trust, and so for an account; and see Wisman v. Smith, 8 Jones, Ed. 1st. The account by one partner against another, as in other cases of a bill limitations is equally applicable in the case of a bill for an the point, that the rule with respect to the bar of the Statute of B. Mon. 582. Widmair v. Gaynor, 32 Md. 181, is an authority to 372; Kane v. Woodcock, 7 Johns. 34, 80; Kearney v. Fitzpatrick, 18 like, are subject to the statute. The doctrine of that case is attractive trusts, resulting from partnerships, agencies, and the ment of law, such as executorships and administrations; but com- created by deed or will, and perhaps not to those created by appoint- hat the Statute of Limitations does not apply to direct trusts following language: "In Farman v. Brooks, 9 Pick. 312, it was held "In Alperetz v. Wolf, 52 Ill. 182, this court held the

On this point, we are of the opinion that in the state of the pleadings the court erred in granting the injunction and in appointing a receiver without determining the merits of the respective contentions. Defendants also point out that Dalton & Balch, Inc., was dissolved by a decree of the Superior Court of Cook County on May 1, 1939, and that therefore no action can be brought against that corporation, its directors or shareholders after a lapse of two years from the date of its dissolution. (Sec. 187.04, Sec. 32, Ill. Rev. Stat. 1941). It is admitted that this corporation was dissolved on May 1, 1939 and that more than two years elapsed after such dissolution before the instant action was commenced. At this time it is unnecessary for us to pass on this point.

The third point advanced by defendant is that plaintiff admitted as a matter of law that Olive K. Balch was a director and knew and consented to the conduct of defendant with regard to the property involved. The motion to dismiss, supported by an affidavit, and the answer to which no reply or counter-affidavit was filed, stated a complete defense, and all the allegations of the answer are true. Plaintiff cannot secure any part of the relief she seeks. Plaintiff states that a reply to the answer appears in the additional record. Apparently, a reply was filed by plaintiff after the defendant's answer. Plaintiff declined to allow plaintiff to file an additional record.

can only review a ruling of the trial court on the matters before that court at the time the rulings complained of were made. We cannot consider matters that were not and could not be considered by the trial court at the time the rulings were made. In view of the denials and complete defense presented by the affidavit and the answer, the court should not have granted the orders for the injunctions and for the appointment of the receiver without going into the merits of the case.

The fourth point argued by defendants is that the orders complained of were entered contrary to law. Motions for preliminary injunctions where no answer has been filed should be determined solely upon the sufficiency of the complaint. Where an answer is filed, however, both the complaint and the answer must be considered. If the denials and allegations of the answer present a defense to the relief sought, then it becomes necessary for the court to determine where the equity lies from testimony or the reading of affidavits or both. Section 15 of the Injunction Act (Sec. 15, Ch. 69, Ill. Rev. Stat. 1941) provides that a motion to dissolve an injunction may be made at any time upon answer, or for want of equity on the face of the complaint. Section 16 provides that upon a motion to dissolve an injunction after answer, the court shall not be bound to take the answer as absolutely true, but shall decide the motion upon the weight of the testimony. Section 17 provides that the plaintiff may support his complaint and the defendant may support his answer by affidavits filed with the same, which may be read in evidence on the hearing of the motion to dissolve the injunction. In view of the allegations and denials of the answer it was the duty of the court to hear testimony or to read the affidavits in order to determine where the truth lay before entering the orders for injunctions or the order appointing a receiver.

Finally, defendants urge that the court erred in granting the injunctions and appointing a receiver without bond. Sec. 54, Chap. 22, Ill. Rev. Stat. 1941, provides that before any receiver



can only review a ruling of the trial court on the matters before that court at the time the rulings complained of were made. We cannot consider

matters that were not and could not be considered by the trial court at the time the rulings were made. In view of the denial and complaint

defense presented by the affidavit and the answer, the court should not have granted the orders for the injunction and for the appointment of the receiver without going into the merits of the case.

The fourth point argued by defendants is that the orders complained of were entered contrary to law. Motions for preliminary injunctions where no answer had been filed should be determined solely

upon the sufficiency of the complaint. Where an answer is filed,

however, both the complaint and the answer must be considered. If

the denial and allegations of the answer present a defense to the relief sought, then it becomes necessary for the court to determine

where the equity lies from testimony on the reading of affidavits or

both. Section 15 of the Injunction Act (Sec. 15, Ch. 82, Ill. Rev.

Stat. 1941) provides that a motion to dissolve an injunction may be

made at any time upon answer, or for want of equity on the face of the

complaint. Section 16 provides that upon a motion to dissolve an

injunction after answer, the court shall not be bound to take the answer

into absolutely true, but shall decide the motion upon the weight of the

testimony. Section 17 provides that the plaintiff may support his

complaint and the defendant may support his answer by affidavits filed

with the same, which may be read in evidence on the hearing of the

motion to dissolve the injunction. In view of the allegations and

denials of the answer it was the duty of the court to hear testimony

or to read the affidavits in order to determine where the truth lay

before entering the orders for injunctions or the order appointing a

receiver.

Finally, defendants urge that the court erred in granting

the injunctions and appointing a receiver without bond. Sec. 84,

Chap. 82, Ill. Rev. Stat. 1941, provides that before any receiver

shall be appointed, the party making the application shall give bond to the adverse party, provided that bond need not be required when for good cause shown, and upon notice and full hearing the court is of the opinion that a receiver ought to be appointed without such bond. In this case plaintiff did not make any showing which would warrant the court in excusing the giving of a bond. The statutory requirement was ignored. Section 9 of the Injunction Act requires that the plaintiff shall give bond unless the court for good cause shown is of the opinion that the injunction ought to be granted without bond. When the motion to dissolve the injunctions filed February 25, 1943 was heard, the court and the attorneys for plaintiff knew of the defense presented in the answer. Plaintiff complains of the failure of the then attorney for defendants to apprise the court and counsel for plaintiff of the contents of the answer that was filed on February 17, 1943. Plaintiff knew that her motions were being vigorously opposed and it was her duty to read the answer. Certainly all of the parties and the court are presumed to have knowledge of the contents of the answer. It will be understood that we are not passing on the merits of this case. For the reasons stated, the orders of the Circuit Court of Cook County of February 3, 17, 18 and 19, 1943 are reversed.

ORDERS REVERSED.

HEBEL & KILEY, JJ. CONCUR.



shall be appointed, the party making the application shall give bond to the adverse party, provided that bond need not be required when for good cause shown, and upon notice and full hearing the court is of the opinion that a receiver ought to be appointed without such bond. In this case plaintiff did not make any showing which would warrant the court in granting the giving of a bond. The statutory requirement was ignored. Section 9 of the Injunction Act requires that the plaintiff shall give bond unless the court for good cause shown is of the opinion that the injunction ought to be granted without bond. When the motion to dissolve the injunctions filed February 23, 1943 was heard, the court and the attorneys for plaintiff knew of the defense presented in the answer. Plaintiff complains of the failure of the then attorney for defendants to apprise the court and counsel for plaintiff of the contents of the answer that was filed on February 17, 1943. Plaintiff knew that her motions were being vigorously opposed and it was her duty to read the answer. Certainly all of the parties and the court are presumed to have knowledge of the contents of the answer. It will be understood that we are not passing on the merits of this case. For the reasons stated, the orders of the Circuit Court of Cook County of February 3, 17, 18 and 19, 1943 are reversed.

ORDERS REVERSED.

HERBERT A. KELLY, JR. COUNSEL.

CHARLES FRANCIS COLEMAN,

Plaintiff and Appellee,

v.

MARJORIE BLOCK STEIN, HELEN R. BLOCK,  
PHILIP D. BLOCK, Trustee under the  
Last Will and Testament of Emanuel J.  
Block, deceased, and LEOPOLD E. BLOCK,  
Trustee under the Last Will and  
Testament of Emanuel J. Block, deceased,

Defendants and Appellants.

APPEAL FROM THE

CIRCUIT COURT OF

COOK COUNTY.

Hon. Robert A. Meier, Jr.,  
Judge Presiding.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendants in a suit at law by this appeal seek to reverse a judgment of the Circuit Court of Cook County rendered against the defendants, Marjorie Block Stein, Helen R. Block, Philip D. Block, Trustee under the last will and testament of Emanuel J. Block, deceased, and Leopold E. Block, trustee under the last will and testament of Emanuel J. Block, deceased, for \$5,000 and costs, for broker's commissions found due the plaintiff in connection with the sale of the Empire Stock Farm in Kane County, Illinois. Judgment was rendered pursuant to a jury verdict in favor of the plaintiff against the four defendants.

Two points are raised in this case on the pleadings, the first being the question of variance between the plaintiff's amended complaint and his proof, in that in paragraph 11 of the amended complaint the plaintiff alleges that the purchase of the property from the defendants was due solely to the efforts and services rendered by the plaintiff in inducing the purchaser to inspect the property with the plaintiff, and in supplying the purchaser with the names and addresses of the then owners of the property, whereas the proof, as alleged by the defendants, shows that the plaintiff never inspected the property with the purchaser, nor induced the purchaser to inspect the property, and that there is no evidence whatsoever that the plaintiff gave the names and addresses of the owners of the property to the purchaser.



APPEAL FROM THE  
CIRCUIT COURT OF  
COCK COUNTY.

Hon. Robert A. Meier, Jr.,  
Judge Presiding.

Plaintiff and Appellee,

v.

MARJORIE BLOCK, TRUSTEE UNDER THE  
LAST WILL AND TESTAMENT OF  
EMMANUEL J. BLOCK, DECEASED, and  
LEOPOLD E. BLOCK, DECEASED,  
Trustees under the last will and  
testament of Emanuel J. Block, deceased,

Defendants and Appellants.

MR. JUSTICE HEARL DELIVERED THE OPINION OF THE COURT.

The defendants in a suit at law by this appeal seek to

reverse a judgment of the Circuit Court of Cook County rendered

against the defendants, Marjorie Block Stein, Helen R. Block,

Philip D. Block, Trustees under the last will and testament of

Emmanuel J. Block, deceased, and Leopold E. Block, trustee under the

last will and testament of Emanuel J. Block, deceased, for \$5,000

and costs, for broker's commissions found due the plaintiff in

connection with the sale of the Empire Stock Farm in Kane County,

Illinois. Judgment was rendered pursuant to a jury verdict in

favor of the plaintiff against the four defendants.

Two points are raised in this case on the pleadings, the

first being the question of variance between the plaintiff's amended

complaint and his proof, in that in paragraph 11 of the amended

complaint the plaintiff alleges that the purchase of the property

from the defendants was due solely to the efforts and services

rendered by the plaintiff in inducing the purchaser to inspect the

property with the plaintiff, and in supplying the purchaser with

the names and addresses of the then owners of the property, whereas

the proof, as alleged by the defendants, shows that the plaintiff

never induced the property with the purchaser, nor induced the

purchaser to inspect the property, and that there is no evidence

whatsoever that the plaintiff gave the names and addresses of the

The second point raised on the pleadings is the contention of the plaintiff in the trial court that he was not required to establish that Henry L. Stein was the agent of the owners of the property, because the agency was admitted by the pleadings. Paragraph 3 of the amended complaint alleges that the defendants, "by and through Henry L. Stein, the husband of said Marjorie Block Stein, the duly authorized agent of the said defendants, did employ the plaintiff and requested the plaintiff to find and procure for the defendants a purchaser for the said property". In the answers of Helen R. Block and Marjorie Block Stein to the amended complaint, each denies paragraph 3 of the amended complaint and each and all of the allegations therein contained. In the joint and several answer of Philip D. Block and Leopold E. Block, trustees under the last will and testament of Emanuel J. Block, deceased, to the amended complaint, they state: "As to paragraph 3 of the amended complaint, these defendants deny that these defendants, by or through Henry L. Stein or anyone else, did employ the plaintiff or request the plaintiff to find and procure for the defendants a purchaser for the said property". Defendants contend that on these pleadings there is neither a proper allegation of agency in Stein nor a failure of the defendants to deny such agency.

It appears from the statement of facts that Emanuel J. Block died early in March 1939, and left as a part of his estate a large dairy farm located in Kane County, Illinois. His will was admitted to probate in Kane County, Illinois, on March 21, 1939. Under the terms of the will, after certain specific bequests, the decedent left all the rest, residue and remainder of his estate, including this farm, to his two brothers, Leopold E. Block and Philip D. Block, as trustees, with full power of management and sale, with the direction to pay the net income from the trust estate in equal shares to his two daughters, Marjorie Block Stein and Helen R. Block, and



The second point raised on the pleadings is the contention of the plaintiff in the trial court that he was not required to establish that Henry I. Stein was the agent of the owners of the property, because the agency was admitted by the pleadings. Paragraph 3 of the amended complaint alleges that the defendants, "by and through Henry I. Stein, the husband of said Marjorie Block Stein, the duly authorized agent of the said defendants, did employ the plaintiff and requested the plaintiff to find and procure for the defendants a purchaser for the said property". In the answers of Helen R. Block and Marjorie Block Stein to the amended complaint, each denies paragraph 3 of the amended complaint and each and all of the allegations therein contained. In the joint and several answer of Philip D. Block and Leopold B. Block, trustees under the last will and testament of Emanuel J. Block, deceased, to the amended complaint, they state: "As to paragraph 3 of the amended complaint, these defendants deny that these defendants, by or through Henry I. Stein or anyone else, did employ the plaintiff or request the plaintiff to find and procure for the defendants a purchaser for the said property". Defendants contend that on these pleadings there is neither a proper allegation of agency in Stein nor a failure of the defendants to deny such agency. It appears from the statement of facts that Emanuel J. Block died early in March 1939, and left as a part of his estate a large dairy farm located in Kane County, Illinois. His will was admitted to probate in Kane County, Illinois, on March 21, 1939. Under the terms of the will, after certain specific bequests, the decedent left all the real, personal and remaining of his estate, including this farm, to his two brothers, Leopold B. Block and Philip D. Block, as trustees, with full power of management and sale, with the direction to pay the net income from the trust estate in equal shares to his two daughters, Marjorie Block Stein and Helen R. Block, and

to pay one-half of each daughter's share of said trust estate to the daughters when they respectively reach the age of thirty years, and the other one-half of the trust estate to each of the daughters when they respectively attain the age of thirty-five years. The trustees, who were also the executors under the will, and as executors were given the same powers as were given to them as trustees, were anxious to sell the Empire Stock Farm. Within one month after the death of Emanuel J. Block the trustees under his will employed a broker by the name of A. L. Allen to find a purchaser for the farm, and Allen worked on the sale of the farm from April to November, 1939, when the farm was sold to one Harry Markheim, pursuant to a contract dated October 3, 1939 between Markheim and Leopold E. Block and Philip D. Block, as executors and trustees under the will of Emanuel J. Block, deceased. Henry L. Stein, the son-in-law of Emanuel J. Block and the husband of Marjorie Block Stein, had often visited the farm and was familiar therewith. The trustees, Leopold E. Block and Philip D. Block, were not at all familiar with the farm and had probably never seen it. It was natural, therefore, that in an effort to sell the farm inquiries regarding the farm were referred to Stein.

In May, 1939, the plaintiff, Charles Francis Coleman, a real estate broker, met Harry Markheim, an attorney in Chicago, found he was looking for farm property, and showed him numerous farms, but never took him on the Empire Stock Farm. At one time it appears from the facts that early in June, Coleman drove Markheim along the public highway past the Block farm, and mentioned it as being the finest farm in the region. Markheim replied that it was too big and that he was not interested, and would not bother to stop and inspect the farm.

It also appears from the facts as they are in this record that Coleman's only effort thereafter to sell this farm consisted in taking some photographs of the farm and sending them to Markheim in a



to pay one-half of each daughter's share of said trust estate to the daughters when they respectively reach the age of thirty years, and the other one-half of the trust estate to each of the daughters when they respectively attain the age of thirty-five years. The trustees, who were also the executors under the will, and as executors were given the same powers as were given to them as trustees, were anxious to sell the Empire Stock Farm. Within one month after the death of Emanuel J. Block the trustees under his will employed a broker by the name of A. L. Allen to find a purchaser for the farm, and Allen worked on the sale of the farm from April to November, 1930, when the farm was sold to one Harry Markheim, pursuant to a contract dated October 3, 1929 between Markheim and Leopold E. Block and Philip D. Block, as executors and trustees under the will of Emanuel J. Block, deceased. Henry L. Stein, the son-in-law of Emanuel J. Block and the husband of Marjorie Block Stein, had often visited the farm and was familiar therewith. The trustees, Leopold E. Block and Philip D. Block, were not at all familiar with the farm and had probably never seen it. It was natural, therefore, that in an effort to sell the farm inquiries regarding the farm were referred to Stein. In May, 1930, the plaintiff, Charles Francis Coleman, a real estate broker, met Harry Markheim, an attorney in Chicago, found he was looking for farm property, and showed him numerous farms, but never took him on the Empire Stock Farm. At one time it appears from the facts that early in June, Coleman drove Markheim along the public highway past the Block farm, and mentioned it as being the finest farm in the region. Markheim replied that it was too big and that he was not interested, and would not bother to stop and inspect the farm. It also appears from the facts as they are in this record that Coleman's only effort thereafter to sell this farm consisted in taking some photographs of the farm and sending them to Markheim in a

letter dated June 21, 1939, wherein he suggested that a Mrs. Thorne buy the property south of the road and that Markheim purchase the farming portion of the property. Plaintiff's testimony indicates that at this time he hoped to make a sale of part of the property to Markheim and part of the property to Mrs. Thorne, who was one of Mr. Markheim's clients. Markheim returned the photographs with a letter dated June 23, 1939, clearly indicating that he was not interested in the farm and that he had no idea whether or not the residence would appeal to Mrs. Thorne -- that she was out of the city and not available.

During the last few days of June, 1939, A. L. Allen learned from a mutual friend, Mrs. Fiske, that Markheim was looking at farms, and he called Markheim by telephone and made an appointment to show him some farms in the Kane County region. On July 1, 1939, they looked at various farms. On July 2, 1939, after looking at other farms, Allen pointed out the Block farm to Markheim, and after some considerable effort induced him to go on the farm and look it over. Markheim immediately "fell in love with it" and asked Allen to ascertain whether or not he could trade in his California ranch for it. Allen later advised Markheim that no trade was acceptable. Markheim, still thinking the farm was too large for him, continued to look at other properties with Allen, but finally on August 1, 1939, he made an offer through Allen to buy the portion of the property south of the road for \$55,000, partly in cash and partly payable over a ten-year period. Due to Leopold E. Block's absence from the city, this offer, which was subsequently refused by the trustees, was withdrawn by Markheim.

It appears from the facts that Markheim never went out with Coleman after June 10, 1939, but looked at numerous other farms with Allen throughout the summer, and finally, late in September, 1939, made an offer through Allen of \$100,000, part cash and part purchase money mortgage, for the entire Empire Stock Farm. The trustees still refused to sell at this price but finally came to a price of \$105,000.



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After further negotiations, at the suggestion of Allen a deal was worked out and a contract was entered into on October 3, 1939, whereby the trustees agreed to sell for \$105,000 - - \$40,000 cash and a \$65,000 mortgage, subject, however, to the right in the purchaser, Markheim, to pay off the \$65,000 mortgage at \$60,000 if full payment was made within one year. The sale was consummated on this basis and title passed on November 4, 1939, as of November 1, 1939. Allen was then paid a commission in accordance with the contract.

Plaintiff states, regarding the facts as they are related by the defendants, that defendants have properly stated the form of action but under the caption of The Pleading, instead of complying with Rule 7 of this court by stating the nature of the pleading, counsel interject an argument on the question of variance; that if there had been a variance which the plaintiff does not concede, it is now raised for the first time and comes too late; that a variance must be specifically pointed out on the trial and cannot be raised for the first time on appeal; and cites Mulligan v. Metropolitan Life Ins. Co., 149 Ill. App. 516, and Reavely v. Harris, 239 Ill. 526.

It is contended by the defendants that the plaintiff, Coleman, was not the procuring cause of the sale of the Empire Stock Farm to Harry Markheim; that the sale was actually brought about by the efforts of a second and independent broker, A. L. Allen. It is suggested from the evidence in this case that the plaintiff, Coleman, in the course of showing numerous farms to Markheim, merely pointed out the Empire Stock Farm, but never was able to persuade Markheim to go upon the farm or inspect the buildings. On one or two other occasions he discussed with Markheim the possible purchase of the Empire Stock Farm, and on June 21, 1939, he wrote a letter to Markheim which it is suggested was apparently the culmination of Coleman's efforts to sell the Empire Stock Farm to Markheim, as the testimony of both Coleman and Markheim indicates that after the date of this letter Markheim



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It is contended by the defendants that the plaintiff, Coleman, was not the procuring cause of the sale of the Empire Stock Farm to Harry Markheim; that the sale was actually brought about by the efforts of a second and independent broker, A. L. Allen. It is suggested from the evidence in this case that the plaintiff, Coleman, in the course of showing numerous farms to Markheim, merely pointed out the Empire Stock Farm, but never was able to persuade Markheim to go upon the farm or inspect the buildings. On one or two other occasions he discussed with Markheim the possible purchase of the Empire Stock Farm, and on June 21, 1939, he wrote a letter to Markheim which it is suggested was apparently the culmination of Coleman's efforts to sell the Empire Stock Farm to Markheim, as the testimony of both Coleman and Markheim indicates that after the date of this letter Markheim

never went out with Coleman and that even correspondence between them with respect to other farms ceased within a week or two thereafter.

It is suggested that from plaintiff's letter of June 21, 1939, the following things are apparent: (a) Coleman did not know whether the owners would divide the property or would sell the farm part of the property at all; (b) Coleman was suggesting a sale of the estate house to Mrs. Thorne and that Markheim purchase the farm portion of the property; (c) the price of the farm had not been discussed; (d) Markheim had not seen the Empire Stock Farm and was not informed as to the crops, live stock and inventory; (e) Coleman himself was not thoroughly familiar with the farm and expected to get further information at a subsequent meeting with Stein, which meeting never materialized.

Markheim, in his letter of June 23, 1939, replying to Coleman's letter of June 21st, clearly indicated his lack of any real interest in the Block farm, and inasmuch as he had no idea whether or not it would appeal to Mrs. Thorne, he saw no purpose in inspecting the farm at that time. [Clearly, as shown by these letters of June 21st and June 23rd, Coleman had definitely not at the time he last dealt with Markheim, procured a purchaser ready, able and willing to purchase on terms satisfactory to the seller.] Markheim expressly stated that when he last saw Coleman, Markheim did not feel that he wanted to buy the Block farm. He had no intention or desire at all of buying the Block farm before he met Mr. Allen. It appears that Coleman did not even know whether the seller would sell all or any part of the farm, except possibly the estate house, which house he was not even trying to sell to Markheim. It appears also that he was not ready to discuss price, not ready to discuss the farm property itself, and he had not shown the farm to his prospect. He had not procured, and never did procure, any offer from Markheim. Coleman testified that he never met the owners, that he never met the beneficiaries of the trust, and that he met Henry L. Stein only once. He failed to show that Stein was the agent of the owners or anything other than a relative by marriage. He never procured any offers and he never participated in any of the negotiations pertain-



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Block farm. He had no intention or desire at all of buying the Block

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know whether the seller would sell all or any part of the farm, except

possibly the estate house, which house he was not even trying to sell

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that he never met the beneficiaries of the trust, and that he met Henry

L. Stein only once. He failed to show that Stein was the agent of the

owners or anything other than a relative by marriage. He never procured

ing to the actual sale.

The reply of Coleman to the suggestions that were called to our attention by the defendants is that of the several brokers who were trying to sell the farm Coleman was the first to interest Markheim, and points to a letter dated June 24, 1939, written by Markheim to Beals, a broker, advising him that Coleman was the first broker to submit the farm to him, and Markheim sent a copy of the letter to Coleman; that in the same letter Markheim stated that the farm was too extensive for his requirements and that it was most doubtful if he would develop any interest in it. On the day previous, Markheim wrote to Coleman, in which letter he stated that he thought an inspection of the premises at that time was a little premature, since Mrs. Thorne would not be back in town until fall. "Frankly, I don't see how anything can be accomplished until Mrs. Thorne returns to Chicago. I have looked at the photographs, which are very attractive. Thinking you may have need for them in the meantime, I am returning them herewith". Markheim testified that he met Coleman May 1, 1939, and saw him seven or eight times up to June 10th, and that the last time he saw him was in the latter part of June, 1939; that he went out with Coleman seven or eight times. Markheim also testified that Coleman did not have any further dealings with him after the middle of July, 1939.

Markheim was called as a witness, first by the plaintiff, and later by the defendants, and so far as the plaintiff was concerned, Markheim was a hostile witness. Markheim told Coleman that he would like to talk to the owners as he thought he could get a better price than having the broker go back and forth. So, it is suggested, it is quite apparent why Allen was substituted as the broker. Markheim got the farm at a lesser price than the figure given to Coleman by Stein and the defendants paid Allen a smaller commission than was claimed by Coleman. Stein preferred to have it appear that Allen acted as the broker in the deal. He recommended Allen to the trustees and conferred with Allen frequently.



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Allen testified that in February, 1939, he called up the trustees and made inquiries about trying to sell the farm for them and was informed that they were not considering selling the farm at that time. Around April 1st, he called them again and he was told to get in touch with Stein. He got in touch with Stein and "he consented to my dealing with the farm". The plaintiff in this action states in this connection that Stein knew that Coleman was the procuring cause for Coleman gave Stein Markheim's name, and although Stein denied it the jury did not believe him. It further appears from the facts stated by the plaintiff that Allen did not meet Markheim until about the first of July, 1939, and up to that time he had never heard of Markheim before. Allen testified on cross examination that he first talked to Markheim the last few days in June, over the telephone; that he had never met Markheim and the first time he met Markheim was when Markheim came to Allen's farm in response to the telephone call.

To sustain his contention that Coleman was the procuring cause, plaintiff cites the case of Rigdon v. More, 226 Ill. 382, where the court said:

"Nor is it always necessary that the purchaser should be actually introduced to the owner by the broker, provided it appears affirmatively that the purchaser was induced to apply to the owner through the instrumentality of the broker or through means employed by the broker. It is sufficient if the sale is effected through the efforts of the broker or through information derived from him."

Further in support of his contention plaintiff cites the case of Doggett v. Ruppert, 178 Ill. App. 230, where it was contended that the broker who brought suit was not the procuring cause of the sale, that his employment had ceased, and that the sale was brought about through other causes than through the efforts of the broker, and this court said in its opinion:

"It is not necessary to narrate it in this opinion. After giving careful consideration to the record before us, we are unable to say that the conclusion of the jury was against the weight of the evidence. The question whether the services and efforts of Doggett were the procuring cause of effecting the sale to Kesner, was a question of fact for the jury, and upon the record before us its verdict should not be disturbed."



Allen testified that in February, 1939, he called up the trustees and made inquiries about trying to sell the farm for them and was informed that they were not considering selling the farm at that time. Around April 1st, he called them again and he was told to get in touch with Stein. He got in touch with Stein and "he consented to my dealing with the farm". The plaintiff in this action states in this connection that Stein knew that Coleman was the procuring cause for Coleman gave Stein Markheim's name, and although Stein denied it the jury did not believe him. It further appears from the facts stated by the plaintiff that Allen did not meet Markheim until about the first of July, 1939, and up to that time he had never heard of Markheim before. Allen testified on cross examination that he first talked to Markheim the last few days in June, over the telephone; that he had never met Markheim and the first time he met Markheim was when Markheim came to Allen's farm in response to the telephone call.

To sustain his contention that Coleman was the procuring cause, plaintiff cites the case of Madon v. Hore, 228 Ill. 382,

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Further in support of his contention plaintiff cites the case of Dorsett v. Burnett, 179 Ill. App. 230, where it was contended that the broker who brought suit was not the procuring cause of the sale, that his employment had ceased, and that the sale was brought about through other causes than through the efforts of the broker, and this court said in its opinion:

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A further citation is the case of Rasar & Johnson v. Spurling, 176 Ill. App. 349; also Ogren v. Sundell, 220 Ill. App. 584, and Knotts v. L.S. & M.S. RY. CO., 172 Ill. App. 550.

However, it is further to be considered that in a case where two independent brokers are involved in the sale of property, it is the broker who actually procures the sale, and not merely the broker who first shows the property, who is entitled to the commission.

It is urged by the defendants that in contrast to the activities of Coleman which have been mentioned, the evidence clearly shows that the broker Allen worked long and hard on the sale of the Empire Stock Farm. He was employed as a broker by the defendant trustees early in April, 1939, advertised the property for sale and showed twenty-five or thirty prospects over the farm during the spring and summer months. About July 1, 1939, just at the time that Coleman was abandoning his efforts to sell the Empire Stock Farm to Markheim, Allen, through a third party learned that Markheim was looking at farms in the Kane County region, contacted Markheim, showed him numerous farms, and induced Markheim, against his will, to go on the Empire Stock Farm and look it over, which resulted in Markheim's making an offer for the farm if a California ranch would be taken in trade. When this proposition was rejected, in an effort to make a deal within Markheim's price range, Allen attempted to, and did, persuade Markheim to make an offer on August 1, 1939, for a part of the farm and procured an earnest money deposit in connection with this offer. When Markheim subsequently withdrew this offer and the same was likewise rejected by the trustees, Allen did not give up but continued to talk about and show this farm to Markheim. He persuaded the trustees to reduce their price many thousand dollars and induced Markheim to increase his offer and to make an offer for the purchase of the entire farm. It appears from the facts that by September, 1939, he had persuaded Markheim to offer \$100,000, and he had persuaded the trustees to accept \$105,000.



A further citation is the case of Nasser & Johnson v. Spaulding, 178 Ill. App. 340; also Baran v. Haggell, 220 Ill. App. 584, and Knight v. L.S. & M.S. Ry. Co., 172 Ill. App. 550.

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Allen suggested the final arrangement on which the sale was consummated, namely, that the trustees sell for \$40,000 cash and \$65,000 purchase money mortgage, subject, however, to the right in the purchaser Markheim to pay off the \$65,000 mortgage at \$60,000 if full payment was made within one year. The sale was consummated on November 4, 1939, as of November 1, 1939, and Allen was paid a commission in accordance with the contract.

The defendant in this action contends that the jury erred in returning a verdict for the plaintiff, and suggests in their brief that the plaintiff Coleman was not the procuring cause of the sale of the Empire Stock Farm to Harry Markheim; that the sale was actually brought about by the efforts of a second and independent broker, A. L. Allen; and point out and call attention to the evidence, which seems to indicate that the plaintiff Coleman in the course of showing numerous farms to Markheim merely pointed out the Empire Stock Farm, but never was able to persuade Markheim to go upon the farm or inspect the buildings; that on one or two occasions he discussed with Markheim the possible purchase of the Empire Stock Farm and on June 21, 1939 he wrote a letter to Markheim, which apparently was the culmination of Coleman's efforts to sell the Empire Stock Farm to Markheim, as the testimony of both Coleman and Markheim indicates that after the date of this letter Markheim never went out with Coleman, and that even correspondence between them with respect to other farms ceased within a week or two thereafter.

While it may be in a measure somewhat of a repetition of the suggestions that we have made in the statement of the facts, it appears that Markheim in his letter of June 23, 1939, replying to Coleman's letter of June 21, clearly indicates his lack of any interest in the Block farm, and inasmuch as he had no idea whether or not it would appeal to Mrs. Thorne he saw no purpose in inspecting the farm at that time. It appears clearly from the letters of June 21st and June 23 that Coleman had definitely not at the time he last dealt



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returning a verdict for the plaintiff, and suggests in their brief that

the plaintiff Coleman was not the procuring cause of the sale of the

Empire Stock Farm to Harry Markheim; that the sale was actually

brought about by the efforts of a second and independent broker, A. L.

Allen; and point out and call attention to the evidence, which seems

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farms to Markheim merely pointed out the Empire Stock Farm, but never

was able to persuade Markheim to go upon the farm or inspect the buildings;

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However, when we come to discuss the plaintiff's brief we find that the suggestion is offered that Coleman was the procuring cause of the sale of the Empire Stock Farm to Markheim, that authorities cited support the statement, and that the question whether Coleman was the procuring cause was peculiarly within the province of the jury to determine. However, it appears from plaintiff's own brief that there were several brokers who were trying to sell the farm, and the suggestion is made that Coleman was the first to interest Markheim. It does not appear from the evidence in this case that there was any contention by Coleman that there was a prospect of selling the farm, because on the day previous to June 24, Markheim wrote to Coleman a letter in which he stated that he thought an inspection of the premises at that time was a little premature, since Mrs. Thorne would not be back in town until fall, and "Frankly I do not see how anything can be accomplished until Mrs. Thorne returns to Chicago. I have looked at the photographs, which were very attractive, which you mailed to me. Thinking you might have need for them in the meantime I am returning them herewith". It appears from the facts



with Markheim procured a purchaser ready, able and willing to purchase on terms satisfactory to the seller. Markheim expressly stated that when he last saw Coleman, Markheim did not feel that he wanted to buy the block farm. He had no intention or desire at all of buying the block farm before he met Mr. Allen. It is clear that Coleman did not even know whether the seller would sell all or any part of the farm, except possibly the estate house, which house he was not even trying to sell to Markheim. It appears too that he was not ready to discuss price and he was not ready to discuss the farm property itself; and he had not even shown the farm to his prospect. Coleman testified that he never met the owners, that he never met the beneficiaries of the trust, and that he met Henry J. Stein only once. He failed to show that Stein was the agent of the owners. However, when we come to discuss the plaintiff's brief we find that the suggestion is offered that Coleman was the procuring cause of the sale of the Empire Block Farm to Markheim, that authorities cited support the statement, and that the question whether Coleman was the procuring cause was peculiarly within the province of the jury to determine. However, it appears from plaintiff's own brief that there were several brokers who were trying to sell the farm, and the suggestion is made that Coleman was the first to interest Markheim. It does not appear from the evidence in this case that there was any contention by Coleman that there was a prospect of selling the farm, because on the day previous to June 24, Markheim wrote to Coleman a letter in which he stated that he thought an inspection of the premises at that time was a little premature, since Mrs. Thorne would not be back in town until fall, and "Frankly I do not see how anything can be accomplished until Mrs. Thorne returns to Chicago. I have looked at the photographs, which were very attractive, which you mailed to me. Thinking you might have need for them in the meantime I am returning them herewith." It appears from the facts

as they are stated in the letter that it was Markheim and not Coleman who was trying to interest Mrs. Thorne. Markheim testified that he met Coleman May 1st, 1939, some seven or eight times up to June 10th, and that the last time that he saw him was in the latter part of June, 1939. Markheim also testified that Coleman did not have any further dealings with him after the middle of July, 1939. Markheim was first called as a witness by the plaintiff and later by the defendants, and it would appear from the evidence that so far as the plaintiff was concerned Markheim was a hostile witness. Markheim told Coleman he would like to talk to the owners as he thought he would get a better price than by having the broker go back and forth. And so it is quite apparent why Allen was substituted as the broker.

Plaintiff also calls to our attention that the case of Rigdon v. More, 226 Ill. 382, is cited in Rasar & Johnson v. Spurling, 176 Ill. App. 349, where at page 351, the court said:

"The mere fact that negotiations may have been discontinued for a short time will not defeat a recovery. In order to constitute an abandonment the evidence must not only show the breaking off of the negotiations, but also an abandonment of all intention by the purchaser of purchasing the property."

However, it is of course a well known proposition reasonable in theory that a broker is not entitled to a commission if another broker is the procuring cause of the sale, and in support of this suggestion defendants have cited Grove v. Elsinor Apartments, Inc., 315 Ill. App. 492, and it appears from the abstract opinion in that case that one Miller, a real estate broker, in February, 1940, advertised the Elsinor building for sale and one Marhoefer answered the advertisement. Miller took him through the building and in March, 1940, procured an offer of \$37,000 or \$39,000, all cash. He introduced Marhoefer to Joy, a representative of the sellers, who indicated that the sellers would not accept less than \$41,500. Consequently no deal was then made. Marhoefer subsequently through his own broker Stearn, in July, 1940, contracted for the purchase of the Elsinor Building at \$40,500, and the sale was thereafter consummated. In



as they are stated in the letter that it was Markheim and not Coleman

who was trying to interest Mrs. Thorne. Markheim testified that he met Coleman May 1st, 1939, some seven or eight times up to June 10th,

and that the last time that he saw him was in the latter part of

June, 1939. Markheim also testified that Coleman did not have any

further dealings with him after the middle of July, 1939. Markheim

was first called as a witness by the plaintiff and later by the

defendants, and it would appear from the evidence that as far as

the plaintiff was concerned Markheim was a hostile witness. Markheim

told Coleman he would like to talk to the owners as he thought he

would get a better price than by having the broker go back and forth.

And so it is quite apparent why Allen was substituted as the broker.

Plaintiff also calls to our attention that the case of

Madon v. Hore, 238 Ill. 382, is cited in Rasag & Johnson v. Burlington,

178 Ill. App. 349, where at page 381, the court said:

"The mere fact that negotiations may have been discontinued for a short time will not defeat a recovery. In order to constitute an abandonment the evidence must not only show the breaking off of the negotiations, but also an abandonment of all intention by the purchaser of purchasing the property."

However, it is of course a well known proposition reasonable

in theory that a broker is not entitled to a commission if another

broker is the procuring cause of the sale, and in support of this

suggestion defendants have cited Grove v. Elston Apartments, Inc.,

318 Ill. App. 482, and it appears from the abstract opinion in that

case that one Miller, a real estate broker, in February, 1940,

advertised the Elston building for sale and one Marhofer answered

the advertisement. Miller took him through the building and in March,

1940, procured an offer of \$27,000 or \$29,000, all cash. He introduced

Marhofer to Joy, a representative of the sellers, who indicated that

the sellers would not accept less than \$41,500. Consequently no

deal was then made. Marhofer subsequently through his own broker

Starn, in July, 1940, contracted for the purchase of the Elston

building at \$40,500, and the sale was thereafter consummated. In

that case the court said in its opinion:

"We believe the plaintiff may have interested Marhoefer in the first instance, but we also believe that that interest waned and plaintiff's efforts did not effect or bring about the sale, and only the person whose efforts did so is entitled to the commission. White v. Sellmyer, 157 Ill. App. 435. To confirm our view, we compare the efforts of the brokers. In addition to showing the Marhoefers the building, plaintiff had conferences and conversations with Marhoefer, and Joy furnished a statement of income and expenses to Marhoefer and told him he could get a commitment for a \$28,000 mortgage on the property if the deal was made. It seems that nothing further was done by him. \* \* \* He did not submit a written offer \* \* \* either on behalf of Marhoefer or anyone else. At Marhoefer's request, Stearn appraised the property, arranged the sale of Marhoefer's three-flat building, the mortgage on the property to be purchased, and a personal loan from the Prairie State Bank, all of which enabled Marhoefer, with \$5,000 to \$6,000 in the bank, to raise the \$40,500 necessary for the purchase. He also handled the details of the written offer to purchase. The finding of the Municipal Court that Miller was the procuring cause of the sale is clearly against the weight of the evidence. Clatt v. Anderson, 257 Ill. App. 630. The defendant complains that Joy resisted his offers of a purchase below \$41,500, and later sold through Stearn at \$40,500. This complaint suggests only that Stearn succeeded in compromising where Miller had failed."

The case of McGuire v. Harlson, 61 Ill. App. 295, was suggested on like questions, and further in support of the suggestion of the defendant is the case of Burns v. Sullivan, 192 Ill. App. 127, also Reed v. French, 213 Ill. App. 669, and Comerford v. Balousek, 237 Ill. App. 633.

It is suggested with some force by the defendant that if it be supposed in the case at bar the situation were reversed and the sellers had paid a commission to Coleman there can be no question that Allen could immediately sue for and recover a commission for his part in effecting the sale to Markheim. Allen's case in such a situation could have only one result -- he would recover a full commission. He could show his employment by some of the defendants; he could show six months' effort in selling the farm; he could show three months of steady work with the ultimate purchaser, the bringing in of various offers and the negotiation and preliminary preparation of the actual contract.

So from the facts as they appear in the suggestions of the defendants, the procuring cause of this sale is that cause in which



that as the court said in its opinion:

"We believe the plaintiff may have interested Harboester in the first place, but we also believe that that interest was not plaintiff's effort did not effect or bring about the sale, and only the person whose efforts it is as entitled to the commission. White v. Bellamy, 127 Ill. App. 435. To confirm our view, we compare the efforts of the brokers. In addition to showing the Harboester the building, plaintiff had conferences and conversations with Harboester, and Joy furnished a statement of income and expenses to Harboester and told him he could get a commission for a \$2,000 mortgage on the property if the deal was made. It seems that nothing further was done by him. " " " He did not submit a written offer either on behalf of Harboester or anyone else. At Harboester's request, Steam appraised the property, arranged the sale of Harboester's three-flat building, the mortgage on the property to be purchased, and personal loan from the Prairie State Bank, all of which enabled another, with \$5,000 to \$8,000 in the bank, to make the \$40,000 necessary for the purchase. He also handled the details of the written offer to purchase. The finding of the Municipal Court that Miller was the procuring cause of the sale is clearly against the weight of the evidence. Gift v. Anderson, 237 Ill. App. 630. The defendant complains that Joy received his offer of a purchase price of \$1,500, and later sold through Steam at \$40,000. This complaint states only that Steam succeeded in compromising where Miller had failed."

The case of McQuire v. Carlson, 21 Ill. App. 295, was suggested

on like questions, and further in support of the suggestion of the defendant is the case of Burge v. Sullivan, 128 Ill. App. 127, also Lead v. French, 213 Ill. App. 659, and Gonskyford v. Helmes, 237 Ill. App. 632.

It is suggested with some force by the defendant that if it be supposed in the case at bar the situation were reversed and the sellers had paid a commission to Coleman there can be no question that Allen could immediately sue for and recover a commission for his part in effecting the sale to Markheim. Allen's case in such a situation could have only one result -- he would recover a full commission. He could show his employment by some of the defendants; he could show six months' effort in selling the farm; he could show three months of steady work with the ultimate purchaser, the bringing in of various offers and the negotiation and preliminary preparation of the actual contract. So from the facts as they appear in the suggestions of the defendants, the procuring cause of this sale is that cause in which

a natural and continued sequence, unbroken by any new independent or intervening cause produced the event without which the sale would not have occurred, and cases are cited in support of this suggestion.

There is another interesting suggestion offered by the defendants, that where a broker is attempting to sell to two persons jointly, the fact that one of the two persons subsequently buys does not of itself entitle the broker to commissions; and it would appear from plaintiff's evidence, and particularly his letter of June 21 to Markheim, to be clearly shown that Coleman never expected to interest Markheim in the purchase of the Empire Stock Farm, but that the most he ever had in mind was working out a deal to sell Markheim a part of the farm and to sell Markheim's legal client the other part of the farm. Stein's testimony definitely states that it was Mrs. Thorne's name which Coleman gave him as a prospect and not Markheim's, and that it was for her Coleman desired the pictures of the farm. As Markheim was Mrs. Thorne's attorney, Coleman's sending the pictures to Markheim is not inconsistent with the primary intent to sell Mrs. Thorne, particularly in view of the wording of Coleman's letter of June 21, 1939. Cited in support of the proposition thus offered by the defendants are the cases of Clark v. Nessler, 50 Ill. App. 550, and Muraweka v. Roeger, 219 Ill. App. 241.

Therefore under the facts as they were presented to the jury it is the contention that, since the evidence in this case wholly fails to show that the plaintiff was the procuring cause of the sale, the verdict should have been directed for the defendant.

It is further contended by the defendants that a judgment against the defendants Philip D. Block and Leopold E. Block, as trustees, in a court of law is clearly erroneous, and, since the beneficiaries of the trust were not the owners of the property, there is no evidence to support the verdict or judgment against them. It appears that plaintiff Coleman's attorney definitely indicated that he was suing Leopold E. Block and Philip D. Block as trustees and



a natural and continued sequence, unbroken by any new independent or intervening cause produced the event without which the sale would not have occurred, and cases are cited in support of this suggestion.

There is another interesting suggestion offered by the defendants, that where a broker is attempting to sell to two persons jointly, the fact that one of the two persons subsequently buys does not of itself entitle the broker to commission; and it would appear from plaintiff's evidence, and particularly his letter of June 21 to Markheim, to be clearly shown that Coleman never expected to interest Markheim in the purchase of the Empire Stock Farm, but that the most he ever had in mind was working out a deal to sell Markheim a part of the farm and to sell Markheim's legal client the other part of the farm. Stein's testimony definitely states that it was Mrs. Thorne's name which Coleman gave him as a prospect and not Markheim's, and that it was for her Coleman desired the pictures of the farm. As Markheim was Mrs. Thorne's attorney, Coleman's sending the pictures to Markheim is not inconsistent with the primary intent to sell Mrs. Thorne, particularly in view of the wording of Coleman's letter of June 21, 1939. Cited in support of the proposition thus offered by the defendants are the cases of Clark v. Weisler, 80 Ill. App. 250, and Murphy v. Boney, 219 Ill. App. 241.

Therefore under the facts as they were presented to the jury it is the contention that, since the evidence in this case wholly fails to show that the plaintiff was the procuring cause of the sale, the verdict should have been directed for the defendant. It is further contended by the defendants that a judgment against the defendants Philip D. Block and Leopold E. Block, as trustees, in a court of law is clearly erroneous, and, since the beneficiaries of the trust were not the owners of the property, there is no evidence to support the verdict or judgment against them. It appears that plaintiff Coleman's attorney definitely indicated that he was suing Leopold E. Block and Philip D. Block as trustees and

not individually. It is called to our attention that the trial court stated that it would not permit a judgment to be entered in this proceeding against Philip D. Block and Leopold E. Block individually. The judgment was entered against these two parties as trustees. Attention is called to the case of Equitable Trust Co. v. Taylor, 330 Ill. 42. There, as appears from the suggestions that were offered, Taylor, one of three trustees, executed a promissory note and suit was subsequently brought on the note against the three trustees, but was later dismissed as to all but Taylor. A judgment was entered against Taylor individually, and the Appellate Court's reversal of this judgment was affirmed by the Supreme Court, the court saying:

" \* \* \* Though he describes himself as trustee, he is personally liable for its breach [of contract], and a personal judgment is the only judgment which can be rendered against him. An action against a trustee in his representative capacity is unknown to a court of law, for the law takes no cognizance of the trust relation. (Wahl v. Schmidt, 307 Ill. 331). If a trustee makes a contract in his own name for the benefit of the trust estate he is liable on it personally and not in his representative capacity, whether he describes himself as trustee or not."

Attention is called to the record in the case at bar, and it is stated that from an examination of it it is clear that plaintiff's counsel was seeking no remedy against the trustees individually, and that the court was in error in permitting the suit to continue against Leopold E. Block and Philip D. Block, as trustees. When defendants' counsel asked directed verdicts or dismissals as to the separate defendants, the trial court expressly stated, "Philip D. Block and Leopold Block are not sued individually". And the court said in reply to the suggestions that were offered that " \* \* \* the amended complaint does not sue them individually, they are sued as trustees of this estate \* \* \* I would not give the jury the forms or receive a verdict directed to them individually." Then the question is raised as to what the evidence shows as against the beneficiaries, and it is stated that the evidence clearly shows that the beneficiaries



not individually. It is called to our attention that the trial court stated that it would not permit a judgment to be entered in this proceeding against Philip D. Block and Leopold E. Block individually. The judgment was entered against these two parties as trustees. Attention is called to the case of Montpelier Trust Co. v. Taylor, 330 Ill. 42. There, as appears from the suggestions that were offered, Taylor, one of three trustees, executed a promissory note and suit was subsequently brought on the note against the three trustees, but was later dismissed as to all but Taylor. A judgment was entered against Taylor individually, and the Appellate Court's reversal of this judgment was affirmed by the Supreme Court, the court saying:

" \* \* \* Though he described himself as trustee, he is personally liable for its breach [of contract], and a personal judgment is the only judgment which can be rendered against him. An action against a trustee in his representative capacity is unknown to a court of law, for the law takes no cognizance of the trust relation. (Wahl v. Schmidt, 307 Ill. 321). If a trustee makes a contract in his own name for the benefit of the trust estate he is liable on it personally and not in his representative capacity, whether he describes himself as trustee or not."

Attention is called to the record in the case at bar, and it is stated that from an examination of it it is clear that plaintiff's counsel was seeking no remedy against the trustees individually, and that the court was in error in permitting the suit to continue against Leopold E. Block and Philip D. Block, as trustees. When defendants' counsel asked directed verdicts or dismissals as to the separate defendants, the trial court expressly stated, "Philip D. Block and Leopold Block are not sued individually". And the court said in reply to the suggestions that were offered that " \* \* \* the amended complaint does not sue them individually, they are sued as trustees of this estate " \* \* I would not give the jury the forms or receive a verdict directed to them individually." Then the question is raised as to what the evidence shows as against the beneficiaries, and it is stated that the evidence clearly shows that the beneficiaries

Marjorie Block Stein and Helen R. Block took no part in the sale of the property, did not enter into the contract under which the sale was consummated and merely delivered quit-claim deeds for no taxable consideration, at the request of the purchaser, in order to obviate any title questions which might arise, since the estate of Emanuel J. Block had not been closed at the time of the conveyance, in case the heirs of Emanuel J. Block should take any steps to attack or set aside the will of Emanuel J. Block, and thus claim an interest outside of the will.

There are further questions that are called to our attention, but we are of the opinion that the jury erred in returning a verdict for the plaintiff.

[We respectfully submit that on the basis of the record in this case the plaintiff wholly failed to establish that he was the procuring cause of the sale of the Empire Stock Farm to Harry Markheim. Therefore, the judgment for the plaintiff in this action for \$5,000 is reversed and remanded with directions to the trial court to enter judgment for the defendant with costs.]

We find that there was no question for the jury to pass upon and that the trial court was in error in refusing to direct a verdict for the defendant at the close of plaintiff's case and at the close of all the evidence.

JUDGMENT REV RSED AND REMANDED  
WITH DIRECTIONS.

BURKE, P.J. AND KILEY, J. CONCUR.



Marjorie Block Stein and Helen M. Block took no part in the sale of the property, did not enter into the contract under which the sale was consummated and merely delivered quit-claim deeds for no valuable consideration, at the request of the purchaser, in order to obviate any title questions which might arise, since the estate of Emanuel J. Block had not been closed at the time of the conveyance, in case the heirs of Emanuel J. Block should take any steps to attack or set aside the will of Emanuel J. Block, and thus claim an interest outside of the will.

There are further questions that are called to our attention, but we are of the opinion that the jury erred in returning a verdict for the plaintiff.

We respectfully submit that on the basis of the record in this case the plaintiff wholly failed to establish that he was the procuring cause of the sale of the Empire Block Farm to Harry Kohnstein. Therefore, the judgment for the plaintiff in this action for \$6,000 is reversed and remanded with directions to the trial court to enter judgment for the defendant with costs.

We find that there was no question for the jury to pass upon and that the trial court was in error in refusing to direct a verdict for the defendant at the close of plaintiff's case and at the close of all the evidence.

UNRECORDED BY HAND AND REMANDED  
WITH DIRECTIONS.

BURK, J. J. AND BILLY, J. CONCUR.

42394

SEYMOUR RISCHALL, doing business  
as RISCHALL'S,

Appellee,

v.

R. & R. HOSIERY COMPANY, a corporation,

Appellant.

143  
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO 19

Honorable Frank M. Padden,  
Judge Presiding.

320 I.A. 136

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered upon verdict for the plaintiff in a forcible entry and detainer suit for possession of the premises described in the complaint as "a portion of the store premises, 226 West Adams Street, designated as office space".

Plaintiff and defendant are lessees of adjoining stores at 226 and 228 West Adams Street respectively, each holding a lease from their common lessor, which describes the premises demised to plaintiff as "the store at 226 West Adams Street" and to the defendant as "the store at 228 West Adams Street". The premises of which possession is sought in this suit consist of a small office approximately 5 by 6 feet in area, accessible only from the defendant's store, and separated from the plaintiff's store by partition walls extending from floor to ceiling. It would appear from statements in the briefs that the space involved is a small area entirely within the original boundary lines or four walls of the store premises at 226 West Adams Street. The original lease from the Franklin-Adams Co. to the defendant was for both stores No. 226 and No. 228, for a term expiring December 31, 1941. Under this lease, defendant occupied No. 228 and the R. & R. Dress Co., of which plaintiff was president, occupied No. 226 by a sublease. During the term of this original lease, an opening was made in the partition wall separating the two stores and an area, entirely within No. 226, was set aside for office



SEYMOUR RUSCHALL, doing business  
as RUSCHALL, d.

Appellee,

R. & R. HOSEBERRY COMPANY, a corporation,

Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO

Honorable Frank M. Rodgers,  
Judge Presiding.

3301 A. 36

MR. JUSTICE HERREL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered upon verdict for the plaintiff in a forcible entry and detainer suit for possession of the premises described in the complaint as "a portion of the store premises, 226 West Adams Street, designated as office space". Plaintiff and defendant are lessors of adjoining stores at 226 and 228 West Adams Street respectively, each holding a lease from their common lessor, which describes the premises demised to plaintiff as "the store at 228 West Adams Street" and to the defendant as "the store at 226 West Adams Street". The premises of which possession is sought in this suit consist of a small office approximately 5 by 6 feet in area, accessible only from the defendant's store, and separated from the plaintiff's store by partition walls extending from floor to ceiling. It would appear from statements in the briefs that the space involved is a small area entirely within the original boundary lines or four walls of the store premises at 226 West Adams Street. The original lease from the Franklin-Adams Co. to the defendant was for both stores No. 226 and No. 228, for a term expiring December 31, 1941. Under this lease, defendant occupied No. 228 and the R. & R. Dress Co., of which plaintiff was president, occupied No. 226 by a sublease. During the term of this original lease, an opening was made in the partition wall separating the two stores and an area, entirely within No. 226, was set aside for office

purposes and used jointly by the two companies. On February 1, 1941, the defendant subleased to the R. & R. Dress Co. the store premises No. 226 West Adams Street by lease expiring on the same day as the headlease to the defendant for both stores. By paragraph 21st of this sublease, the Dress Company agreed that, in the event it obtained a lease from the building owner for both stores, No. 226 and No. 228, for a term after December 31, 1941, the Dress Company would sublease to the defendant the store No. 228 for a term co-extensive with the period of the new headlease. This arrangement did not materialize and in lieu thereof the defendant, on October 22, 1941, procured a lease directly from the building owner, for the store No. 228, for a period of one year commencing January 1, 1942, and ending December 31, 1942. Plaintiff, likewise procured, from the building owner, a lease for the store No. 226, on October 17, 1941, for a term of two years, commencing January 1, 1942, and terminating December 31, 1943. Neither of these leases referred to the office space, presently in dispute, or made any provision in relation thereto.

It is the plaintiff's theory that the plaintiff and defendant by their separate leases were entitled to the space within the original boundary lines or walls of their respective stores, No. 226 and No. 228, and that upon the termination of the original headlease, which demised No. 226 and No. 228, on December 31, 1941, and on the termination of the sublease for the premises No. 226, on the same date, December 31, 1941, the plaintiff and the defendant abandoned any previous arrangement between them relating to their respective store premises. By separate negotiation, for their respective stores, with their landlord, plaintiff for a period of two years, defendant for a period of one year, the evident intent of the parties was that the space within the original boundary lines of each of the stores was the space contemplated in each of the new leases, and that therefore the plaintiff



purposes and used jointly by the two companies. On February 1, 1941, the defendant subleased to the F. P. Dress Co. the store premises No. 228 West Adams Street by lease expiring on the same day as the headlease to the defendant for both stores. By paragraph 21st of this sublease, the Dress Company agreed that, in the event it obtained a lease from the building owner for both stores, No. 228 and No. 229, for a term after December 31, 1941, the Dress Company would sublease to the defendant the store No. 228 for a term co-extensive with the period of the new headlease. This arrangement did not materialize and in lieu thereof the defendant, on October 22, 1941, procured a lease directly from the building owner, for the store No. 228, for a period of one year commencing January 1, 1942, and ending December 31, 1942. Plaintiff, likewise procured, from the building owner, a lease for the store No. 229, on October 17, 1941, for a term of two years, commencing January 1, 1942, and terminating December 31, 1943. Neither of these leases referred to the office space, presently in dispute, or made any provision in relation thereto.

It is the plaintiff's theory that the plaintiff and defendant by their separate leases were entitled to the space within the original boundary lines or walls of their respective stores, No. 228 and No. 229, and that upon the termination of the original headlease, which demise No. 228 and No. 229, on December 31, 1941, and on the termination of the sublease for the premises No. 228, on the same date, December 31, 1941, the plaintiff and the defendant abandoned any previous arrangement between them relating to their respective store premises. By separate negotiation, for their respective stores, with their landlords, plaintiff for a period of two years, defendant for a period of one year, the evident intent of the parties was that the space within the original boundary lines of each of the stores was the space contemplated in each of the new leases, and that therefore the plaintiff

was entitled to repossession of the space within the original boundary lines of the store No. 226, after December 31, 1941.

The disputed space is located entirely within the store at No. 226 and is presently partitioned, although defendant in his brief describes this space as being accessible only through his store. Such statement is not correct. It is accessible only to defendant's store in the sense that a door between the disputed space and the main space of 226 is presently locked or nailed.

From the argument offered by the parties it is suggested that it has been held that where premises are described in a lease by the numbers which are over the outside door leading onto a street a presumption arises that such description does not include a part of the building which is not accessible by the door to which the number is affixed, and a case is cited entitled Houghton v. Moore, 141 Mass. 437, which involved a building originally divided by a solid wall from cellar to roof. Before granting a lease in which the leased premises were described by street number, the lessor removed the partition wall on the first floor. The partition remained in place on the upper floors, and it was held that the separate character of the two parts of the building above the first story remained unimpaired and that the lease of the premises by street number did not include the upper stories of the other part of the building which were accessible only from another street number. The court said that when a house or building is described in a lease by a number over the outside doors on a street, the inference is that the building is intended, access to which is had by those doors from that street number.

Attention is also called to Tiffany on Landlord and Tenant, (1910) Vol. 1, page 270, where it is said:

"Such a description (by street number) does not, prima facie at least, include a part of the building which is not accessible by the door to which the number is affixed."

In Underhill on Landlord and Tenant, (1909) Vol. 1, Sec. 273, it is said:



was entitled to repossession of the space within the original boundary lines of the store No. 228, after December 31, 1941.

The disputed space is located entirely within the store at No. 228 and is presently partitioned, although defendant in his brief describes this space as being accessible only through his store. Such statement is not correct. It is accessible only to defendant's store in the sense that a door between the disputed space and the main space of 228 is presently locked or nailed.

From the argument offered by the parties it is suggested that it has been held that where premises are described in a lease by the numbers which are over the outside door leading onto a street a presumption arises that such description does not include a part of the building which is not accessible by the door to which the number is affixed, and a case is cited entitled Houghton v. Moore, 141 Mass. 437, which involved a building originally divided by a solid wall from cellar to roof. Before granting a lease in which the leased premises were described by street number, the lessor removed the partition wall on the first floor. The partition remained in place on the upper floors, and it was held that the separate character of the two parts of the building above the first story remained unimpaired and that the lease of the premises by street number did not include the upper stories of the other part of the building which were accessible only from another street number. The court said that when a house or building is described in a lease by a number over the outside doors on a street, the inference is that the building is intended, access to which is had by those doors from that street number.

Attention is also called to Pittman on Landlord and Tenant (1910) Vol. 1, page 270, where it is said: "Such a description (by street number) does not, prima facie at least, include a part of the building which is not accessible by the door to which the number is affixed."

In Underhill on Landlord and Tenant, (1908) Vol. 1, Sec.

"Where the premises are described in a lease by the numbers which are over the outside door opening on a street, the presumption, which is always rebuttable, is that the building is meant, access to which may be had from the street by means of these doors."

The plaintiff, however, calls our attention to the case of Houghton v. Moore, 141 Mass. 437, as not being in point, the dispute in that case being between the landlord and tenant, whereas in our case the dispute is between two tenants of a common landlord, the premises leased being described as "the building No. 63 and No. 65 Endicott Street." At the time of leasing the landlord was the owner of two adjoining parcels of land, one being in the rear of the other. A brick building had been erected, prior to the lease, on both parcels, three stories in height, with a brick partition wall on the dividing line between the two parcels, extending from the cellar to the roof "without door, passageway or other opening therein". The court said: "the foregoing facts in relation to the existence of said partition wall and the making of said opening therein, were known to the plaintiff before the execution of said lease."

The plaintiff occupied the entire ground floor and the cellar and all of the rooms above the ground floor on the Endicott Street side of the partition wall, but did not occupy the rooms on the other side of the partition wall on Morton Street. The court again said:

"the inference is unavoidable that it was so constructed that the different parts of the building might be separately occupied. Such a partition wall makes the structure two tenements for the purposes of occupation as distinctly as if they had not been built in one block and as parts of one structure."

In order to aid in asserting the true situation as well as the intent of the parties we can consider the evidence as the jury undoubtedly understood it. Originally the store was divided by a solid partition wall, and this was the fact at the time of making the original lease for both stores to the defendant company. The defendant, having subleased to plaintiff's predecessor, of which plaintiff was president, one of the two stores, namely, No. 226, an opening was broken through the partition wall, between the two stores, for convenience and, for a period of time, the defendant and plaintiff's



"Where the premises are described in a lease by the number which are over the outside door opening on a street, the presumption, which is always rebuttable, is that the building is meant, access to which may be had from the street by means of these doors."

The plaintiff, however, calls our attention to the case of

Houghton v. Moore, 141 Mass. 437, as not being in point, the dispute

in that case being between the landlord and tenant, whereas in our

case the dispute is between two tenants of a common landlord, the

premises leased being described as "the building No. 83 and No. 85

Endicott Street." At the time of leasing the landlord was the owner

of two adjoining parcels of land, one being in the rear of the other.

A brick building had been erected, prior to the lease, on both parcels,

three stories in height, with a brick partition wall on the dividing

line between the two parcels, extending from the cellar to the roof

"without door, passageway or other opening therein." The court said:

"the foregoing facts in relation to the existence of said partition wall and the making of said opening therein, were known to the plaintiff before the execution of said lease."

The plaintiff occupied the entire ground floor and the cellar and

all of the rooms above the ground floor on the Endicott Street side

of the partition wall, but did not occupy the rooms on the other side

of the partition wall on Morton Street. The court again said:

"the inference is unavoidable that it was so constructed that the different parts of the building might be separately occupied. Such a partition wall makes the structure two tenements for the purposes of occupation as distinctly as if they had not been built in one block and as parts of one structure."

In order to aid in ascertaining the true situation as well as

the intent of the parties we can consider the evidence as the jury

undoubtedly understood it. Originally the store was divided by a

solid partition wall, and this was the fact at the time of making the

original lease for both stores to the defendant company. The defendant,

having assigned to plaintiff's predecessor, of which plaintiff was

president, one of the two stores, namely, No. 83, an opening was

broken through the partition wall, between the two stores, for con-

venience and, for a period of time, the defendant and plaintiff's

predecessor used a small portion of the space, within No. 226, which was partitioned, as a joint office. When, for reasons of their own, namely, the dissolution of their joint interest, the space was divided between them, it obviously could have been so partitioned only for the remaining period of the then existing leases, which expired December 31, 1941. Thereafter, each of the parties, separately, negotiated new leases, defendant for a period of one year for No. 228, and plaintiff for a period of two years for No. 226. From the authorities which were cited, when the plaintiff leased the premises No. 226 for a period of two years commencing January 1, 1942 and terminating December 31, 1943, such lease included the space of the store that was designated as No. 226, and all of the space in the building, which included the so-called "office space" in the premises known as No. 226.

It is suggested that it is not a question of law as to whether the lease for the store No. 228 included the disputed space. It is purely a factual situation, which the jury determined from the evidence, the physical examination of the premises and their conclusion as to what the parties themselves obviously intended. It appears that the trial court during the course of the trial suggested and permitted the jury to view and examine the premises, and by this examination the jury undoubtedly better interpreted the testimony offered by both parties in the light of reality. Obviously the trial court concurred in the conclusion of the jury for it denied defendant's motion for a new trial and for judgment notwithstanding the verdict. It is urged by the plaintiff that they are unable to agree with the defendant in its statement to the effect that the record is barren of evidence to support the verdict. Defendant in his brief admits the conversation between Reeder, defendant's president, and Galnick, the building manager, to the effect that the defendant would be required to make a separate agreement with plaintiff for the office



predecessor used a small portion of the space, within No. 226, which was partitioned, as a joint office. When, for reasons of their own, namely, the dissolution of their joint interest, the space was divided between them, it obviously could have been so partitioned only for the remaining period of the then existing lease, which expired December 31, 1941. Thereafter, each of the parties, separately, negotiated new leases, defendant for a period of one year for No. 226, and plaintiff for a period of two years for No. 226. From the authorities which were cited, when the plaintiff leased the premises No. 226 for a period of two years commencing January 1, 1942 and terminating December 31, 1943, such lease included the space of the store that was designated as No. 226, and all of the space in the building, which included the so-called "office space" in the premises known as No. 226.

It is suggested that it is not a question of law as to whether the lease for the store No. 226 included the disputed space. It is purely a factual situation, which the jury determined from the evidence, the physical examination of the premises and their conclusion as to what the parties themselves obviously intended. It appears that the trial court during the course of the trial suggested and permitted the jury to view and examine the premises, and by this examination the jury undoubtedly better interpreted the testimony offered by both parties in the light of reality. Obviously the trial court erred in the conclusion of the jury for it denied defendant's motion for a new trial and for judgment notwithstanding the verdict. It is urged by the plaintiff that they are unable to agree with the defendant in its statement to the effect that the record is barren of evidence to support the verdict. Defendant in his brief admits the conversation between Reeder, defendant's president, and Gelinick, the building manager, to the effect that the defendant would be required to make a separate agreement with plaintiff for the office

space within No. 226, and it is urged that this confirms the fact that neither the defendant nor the building owner contemplated or presumed that the disputed space was included in the lease to the defendant for No. 228. Apparently there was a misrepresentation of fact made to Golnick by Reeder, who informed him that there was an agreement between the defendant and the plaintiff. There is no dispute as to how the opening was made in the partition wall between the two stores and the joint use of the disputed space nor of the separate negotiations by each of the parties for their respective stores. The defendant contended that the plaintiff made no demand for the space before executing his present lease, and in reply the plaintiff said that obviously he could not make such a demand before procuring his lease, because he did not have the right to do so until he had procured the direct lease from the building owner for a term commencing January 1, 1942, but, having procured his lease in October, 1941, he made his demand on Reeder in December, and it is conceded by plaintiff that in December he gave defendant permissive use of the space until the spring of 1942, when he informed Reeder he would require its surrender.

It is thus evident that there was a conflict in the evidence of plaintiff and that of defendant's witness Reeder, rather than a record barren of evidence. There being a conflict in the evidence, the jury's verdict is entitled to great weight, and it cannot be said here that there is no evidence to support the verdict.

After consideration of the facts and the law as applied in an action of this sort, we are of the opinion that the trial court was justified in entering the judgment on the verdict in this case. The judgment is affirmed.

AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.



space within No. 228, and it is urged that this confirms the fact that neither the defendant nor the building owner contemplated or presumed that the disputed space was included in the lease to the defendant for No. 228. Apparently there was a misrepresentation of fact made to Goinick by Reader, who informed him that there was an agreement between the defendant and the plaintiff. There is no dispute as to how the opening was made in the partition wall between the two stores and the joint use of the disputed space nor of the separate negotiations by each of the parties for their respective stores. The defendant contended that the plaintiff made no demand for the space before executing his present lease, and in reply the plaintiff said that obviously he could not make such a demand before procuring his lease, because he did not have the right to do so until he had procured the direct lease from the building owner for a term commencing January 1, 1942, but, having procured his lease in October, 1941, he made his demand on Reader in December, and it is conceded by plaintiff that in December he gave defendant permissive use of the space until the spring of 1942, when he informed Reader he would require its surrender. It is thus evident that there was a conflict in the evidence of plaintiff and that of defendant's witness Reader, rather than a record barren of evidence. There being a conflict in the evidence, the jury's verdict is entitled to great weight, and it cannot be said here that there is no evidence to support the verdict. After consideration of the facts and the law as applied in an action of this sort, we are of the opinion that the trial court was justified in entering the judgment on the verdict in this case. The judgment is affirmed.

AFFIRMED.

BURKE, P. J. and KILLY, J. CONCUR.

LOOP DISCOUNT CORPORATION, a corporation, )

APPEAL FROM

Plaintiff - Appellant,

SUPERIOR COURT

v.

JOSEPH W. SCHULMAN and BESSYE SCHULMAN,  
his wife,

COOK COUNTY.

Defendants - Appellees.

ON REHEARING.

320 I.A. 137

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to foreclose a chattel mortgage wherein plaintiff claimed "at least" \$1,094.50 and costs from defendant, but the master found and the chancellor decreed that \$384.50 was the amount due. The question is whether the decree is against the manifest weight of the evidence. Plaintiff urges that this court, being in as good a position as the trial court to pass on evidence taken before a master, has power to set aside erroneous findings, review evidence and enter proper orders.

Schulman borrowed \$350.00 from Rosefield in October, 1936, and in the following December \$450.00, executing a note and chattel mortgage as security. January 6, 1937, he executed a note and a mortgage in another loan transaction with Rosefield involving \$3000.00. He made certain payments to Rosefield from time to time and in his answer and on the trial admitted owing \$924.00. The master found that the note for \$3,000.00 and mortgage were executed and delivered to Rosefield January 6, 1937; that the same were extended on January 26, 1938 to December 26, 1938 in the amount of \$2,750.00; that January 27, 1938, Rosefield assigned his interest in the note and mortgage and extension instruments to plaintiff; that Schulman has made no payments since July 5, 1938; that plaintiff corporation was organized and is controlled by Rosefield and that the assignment was made as a convenience or to circumvent defects in the execution of the mortgage and note; that the two prior transactions were usurious,



LOOP DISCOUNT CORPORATION, a corporation,

Plaintiff - Appellant,

v.

JOSEPH W. SCHULMAN and MESSYE SCHULMAN,

Defendants - Appellees.

ON REHEARING.

MR. JUSTICE KILLY DELIVERED THE OPINION OF THE COURT.

This is an action to foreclose a chattel mortgage wherein plaintiff claimed "at least" \$1,024.50 and costs from defendant, but the master found and the chancellor decreed that \$384.50 was the amount due. The question is whether the decree is against the manifest weight of the evidence. Plaintiff urges that this court, being in as good a position as the trial court to pass on evidence taken before a master, has power to set aside erroneous findings, review evidence and enter proper orders.

Schulman borrowed \$380.00 from Rosenthal in October, 1936,

and in the following December \$50.00, executing a note and chattel

mortgage as security. January 6, 1937, he executed a note and a mortgage in another loan transaction with Rosenthal involving \$3000.00.

He made certain payments to Rosenthal from time to time and in a

answer and on the trial admitted owing \$324.00. The master found

that the note for \$3,000.00 and mortgage were executed and delivered

to Rosenthal January 6, 1937; that the same were extended on January

28, 1938 to December 28, 1938 in the amount of \$2,750.00; that

January 27, 1938, Rosenthal assigned his interest in the note and

mortgage and extension instruments to plaintiff; that Schulman has

made no payments since July 5, 1938; that plaintiff corporation was

organized and is controlled by Rosenthal and that the assignment was

made as a convenience or to circumvent defects in the execution of

the mortgage and note; that the two prior transactions were voidable,

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY.

8301 A. 137

but paid and disposed of prior to the instant loan; that January 6, 1937, Rosefield executed three checks to the order of the defendants; one for \$825.37, one for \$800.37 and one for \$1,375.00. The first bears the endorsement of the defendants, and below the endorsements "Pay to the order of Dearborn Finance Service" and "Dearborn Finance Service, Leon Rosefield"; that Leon is the brother of Jerome Rosefield and neither he nor Dearborn Finance Service had any interest in the transaction and both endorsements above that of defendants appear to be in the same handwriting; that the second check was endorsed by defendants under the endorsements, "Pay to the order of Harry Weiner" and "Harry Weiner", the latter two appearing in the same handwriting, and beneath Weiner's endorsement, the following: "Leon H. Isaacson, Agent for Trustee of Ingleside Apts."; that there is no explanation of the endorsement of the check to Weiner, nor of Isaacson's interest and Rosefield testified that he did not know whether he received the proceeds on the check; that the third check was endorsed and cashed by the defendants; that the only proceeds of the instant loan paid to defendants was \$1,375.00, although they acknowledged January 29, 1938 being indebted to Rosefield in the sum of \$2,750.00, in which they recited that the information was given to procure from plaintiff its check for \$2,750.00 to pay Rosefield; that the acknowledgment and recital were not sufficient to estop defendants from claiming the defect in the consideration, because plaintiff was not altogether a stranger to the loan transaction; that defendants paid Rosefield on account of the \$1,375.00, \$990.50, leaving a balance due plaintiff of \$384.50.

In the supplemental report the master confirmed his finding of the balance due, "notwithstanding the admission in defendants' answer", because he says it was clear from the evidence that the defendants had made the payments found.

The transactions and testimony concerning them are confusing. A reconsideration of the record indicates that the master's finding



but paid and disposed of prior to the instant loan; that January 8, 1937, Rosenthal executed three checks to the order of the defendants; one for \$225.37, one for \$200.37 and one for \$1,375.00. The first bears the endorsement of the defendants, and below the endorsement "Pay to the order of Dearborn Finance Service" and "Dearborn Finance Service, Leon Rosenthal"; that Leon is the brother of Jerome Rosenthal and neither he nor Dearborn Finance Service had any interest in the transaction and both endorsements above that of defendants appear to be in the same handwriting; that the second check was endorsed by defendants under the endorsement, "Pay to the order of Harry Weiner" and "Harry Weiner", the latter two appearing in the same handwriting, and beneath Weiner's endorsement, the following: "Leon R. Isaacson, Agent for Trustee of Indefinite Apts."; that there is no explanation of the endorsement of the check to Weiner, nor of Isaacson's interest and Rosenthal testified that he did not know whether he received the proceeds on the check; that the third check was endorsed and cashed by the defendants; that the only proceeds of the instant loan paid to defendants was \$1,375.00, although they acknowledged January 29, 1938 being indebted to Rosenthal in the sum of \$2,750.00, in which they recited that the information was given to procure from plaintiff its check for \$2,750.00 to pay Rosenthal; that the acknowledgment and recital were not sufficient to estop defendants from claiming the defect in the consideration, because plaintiff was not altogether a stranger to the loan transaction; that defendants paid Rosenthal on account of the \$1,375.00, \$225.37, leaving a balance due plaintiff of \$384.50. In the supplemental report the master confirmed his finding of the balance due, "notwithstanding the admission in defendants' answer", because he says it was clear from the evidence that the defendants had made the payments found.

The transactions and testimony concerning them are confusing. A reconsideration of the record indicates that the master's finding

of the amount due plaintiff is against the manifest weight of the evidence. There is no basis for finding that the prior liens of \$350 and \$450 were repaid before the third loan of \$3,000 was made. The evidence clearly shows that those prior liens amounting to \$800 were repaid from the proceeds of the \$3,000 loan and the repayment is evidenced by the \$800 check above described. That payment in no wise diminished the \$3,000 loan to plaintiff, but it extinguished the separate pre-existing loans. There was no reason shown for deducting \$825 from the \$3,000 loan, nor \$75 from the \$350 loan, nor \$90 from the \$450 loan. Allowing for these unexplained deductions, we find that defendant actually borrowed \$275, \$360 and \$2,175, or a total of \$2,810, against which we offset the repayment of \$800 and \$990.50 (repayment found by the master), being a total of \$1,790.50, leaving a balance due plaintiff of \$1,019.50.

For the reasons given the decree is reversed and the cause is remanded with directions to enter a decree consistent with the findings made here.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P.J. AND HEBEL, J. CONCUR.



of the amount due plaintiff is against the manifest weight of the evidence. There is no basis for finding that the prior loans of \$350 and \$450 were repaid before the third loan of \$5,000 was made. The evidence clearly shows that those prior loans amounting to \$800 were repaid from the proceeds of the \$5,000 loan and the repayment is evidenced by the \$800 check above described. That payment in no wise diminished the \$5,000 loan to plaintiff, but it extinguished the separate pre-existing loans. There was no reason shown for deducting \$825 from the \$5,000 loan, nor \$5 from the \$500 loan, nor \$90 from the \$450 loan. Allowing for these unexplained deductions, we find that defendant actually borrowed \$275, \$350 and \$5,175, or a total of \$5,810, against which we offset the repayment of \$800 and \$920.50 (repayment found by the master), being a total of \$1,790.50, leaving a balance due plaintiff of \$4,019.50.

For the reasons given the decree is reversed and the cause is remanded with directions to enter a decree consistent with the findings made here.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, P. J. AND HAZEL, J. CONCUR.

42002

LOOP DISCOUNT CORPORATION, a corporation, )

Plaintiff-Appellant, )

v. )

JOSEPH W. SCHULMAN and BESSIE SCHULMAN,  
his wife, )

Defendants-Appellees. )

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

50  
320 I.A. 137

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to foreclose a chattel mortgage wherein plaintiff claimed "at least" \$1,094.50 and costs from defendant, but the master found and the chancellor decreed that \$384.50 was the amount due. The question is whether the decree is against the manifest weight of the evidence. Plaintiff urges that this court, being in as good a position as the trial court to pass on evidence taken before a master, has power to set aside erroneous findings, review evidence and enter proper orders.

Schulman borrowed \$350.00 from Rosefield in October, 1936, and in the following December \$450.00, executing a note and chattel mortgage as security. January 6, 1937, he executed a note and a mortgage in another loan transaction with Rosefield involving \$3,000.00. He made certain payments to Rosefield from time to time and in his answer and on the trial admitted owing \$924.00. The master found that the note for \$3,000.00 and mortgage were executed and delivered to Rosefield January 6, 1937; that the same were extended on January 26, 1938 to December 26, 1938 in the amount of \$2,750.00; that January 27, 1938, Rosefield assigned his interest in the note and mortgage and extension instruments to plaintiff; that Schulman has made no payments since July 5, 1938; that plaintiff corporation was organized and is controlled by Rosefield and



LOOK OF ACCOUNT CONTAINING A STATEMENT

PLAINTIFF-DEFENDANT

V.

JOHN W. SCHULMAN and MRS. M. SCHULMAN, his wife,

Defendants-Appellants.

FOR JUSTICE WITH ADVANCE FOR COSTS OF THIS COURT.

This is an action to foreclose a chattel mortgage wherein plaintiff claimed "at least" \$1,204.50 and costs from defendant, but the master found and the chancellor decreed that \$204.50 was the amount due. The question is whether the master is a final court, being in a good position as the trial court to pass on evidence taken before a master, and to set aside erroneous findings, review evidence and enter proper orders.

Schulman borrowed \$20.00 from Rosenthal in October, 1936, and in the following December, 1936, executed a note and chattel mortgage as security. January 6, 1937, he executed a note and mortgage in another loan transaction with Rosenthal involving \$2,000.00. He made certain payments to Rosenthal from time to time and in his answer and on the trial admitted owing \$21.00. The master found that the note for \$2,000.00 and mortgage were executed and delivered to Rosenthal January 6, 1937; that the same were extended on January 26, 1938 to December 26, 1938 in the amount of \$2,750.00; that January 27, 1938, Rosenthal assigned his interest in the note and mortgage and extension instruments to plaintiff; that Schulman has made no payments since July 6, 1938; that plaintiff corporation was organized and is controlled by Rosenthal and

that the assignment was made as a convenience or to circumvent defects in the execution of the mortgage and note; that the two prior transactions were usurious, but paid and disposed of prior to the instant loan; that January 6, 1937, Rosefield executed three checks to the order of the defendants; one for \$825.37, one for \$800.37 and one for \$1,375.00. The first bears the endorsement of the defendants, and below the endorsements "Pay to the order of Dearborn Finance Service" and "Dearborn Finance Service, Leon Rosefield"; that Leon is the brother of Jerome Rosefield and neither he nor Dearborn Finance Service had any interest in the transaction and both endorsements above that of defendants appear to be in the same handwriting; that the second check was endorsed by defendants under the endorsements, "Pay to the order of Harry Weiner" and "Harry Weiner", the latter two appearing in the same handwriting, and beneath Weiner's endorsement, the following: "Leon H. Isaacson, Agent for Trustee of Ingleside Apts."; that there is no explanation of the endorsement of the check to Weiner, nor of Isaacson's interest and Rosefield testified that he did not know whether he received the proceeds on the check; that the third check was endorsed and cashed by the defendants; that the only proceeds of the instant loan paid to defendants was \$1,375.00, although they acknowledged January 29, 1938 being indebted to Rosefield in the sum of \$2,750.00, in which they recited that the information was given to procure from plaintiff its check for \$2750.00 to pay Rosefield; that the acknowledgment and recital were not sufficient to estop defendants from claiming the defect in the consideration, because plaintiff was not altogether a stranger to the loan transaction; that defendants paid Rosefield on account of the \$1,375.00, \$990.50, leaving a balance due plaintiff of \$384.50.



that the assignment was made as a convenience to the plaintiff  
defects in the execution of the mortgage and note; that the two  
prior transactions were genuine, but said and discussed at length  
to the instant loan; in January 6, 1937, Rosefield received  
three checks to the order of the defendant; one for \$250.00, one  
for \$200.00 and one for \$1,375.00. The first check was endorsed  
of the defendant, and below the endorsement "Pay to the order  
of Gearborn Finance Service" and "Gearborn Finance Service, Leon  
Rosefield"; that Leon is the brother of George Rosefield and  
neither he nor Gearborn Finance Service had any interest in the  
transaction and both endorsements above that of defendant appear  
to be in the same handwriting; that the second check was endorsed  
by defendant under the endorsement, "Pay to the order of Harry  
Weiner" and "Harry Weiner", the latter two appearing in the same  
handwriting, and beneath Weiner's endorsement, the following:  
"Leon H. Isaacson, Agent for Walter of Industrial Bank"; that  
there is no explanation of the endorsement of the check to Weiner,  
nor of Isaacson's interest and Rosefield testified that he did not  
know whether he received the proceeds on the check; that the third  
check was endorsed and cashed by the defendant; that the only  
proceeds of the instant loan said to defendant was \$1,375.00,  
although they acknowledged January 29, 1937 being indebted to  
Rosefield in the sum of \$2,750.00, in which they recited that the  
information was given to procure from plaintiff its check for  
\$2,750.00 to pay Rosefield; that the acknowledgment and recital were  
not sufficient to set off defendant from claiming the defect in the  
consideration, because plaintiff was not altogether a stranger to  
the loan transaction; that defendant paid Rosefield on account of  
the \$1,375.00, leaving a balance due plaintiff of \$1,375.00.

In the supplemental report the master confirmed his finding of the balance due, "notwithstanding the admission in defendants' answer", because it was clear from the evidence that the defendants had made the payments found.

The master's findings have pierced the maze of vague statements and contradictions of the various parties, and arrived at the correct conclusions. It is clear from the evidence that Schulmans borrowed \$350.00 and \$450.00, for which they paid usurious rates. The third loan of \$3,000.00, included the two prior loans amounting to \$800.00, so that the net to defendants on January 6, 1937, should have been \$2,200.00. Thus, we account for the \$800.00 check, especially in view of Rosefield's testimony that he received part of it and plaintiff received part of it, for the evidence is that the first loan was made from Rosefield, and the second from plaintiff. Defendants did not receive, however, \$2,200.00 of the third loan. Another check of \$825.00, variously endorsed to parties seemingly without interest, was withheld from the Schulmans and accordingly, they received but \$1,325.00. The master found there had been paid \$990.50, which sum apparently plaintiff agrees was repaid. Simple subtraction, therefore, leads to the truthful balance found by the master. The master saw the witnesses and heard their testimony and, while his findings are not given the same weight as the verdict of a jury or the decision of a chancellor who has had the same opportunity as the master, yet the latter's findings are entitled to due weight on review and we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. Pasedach v. Auw, 364 Ill. 491.

This is a foreclosure proceeding in equity. In our opinion the master conducted his hearings in a manner designed to arrive at the truth. He accomplished his objective despite



In the undisputed report the master concluded his finding of the balance due, "notwithstanding the admission in Defendants' answer," because it was clear from the evidence that the defendant had made the payment found.

The master's findings have placed the case of record statements and contradictions of the various parties, and arrived at the correct conclusion. It is clear from the evidence that defendant borrowed \$50.00 and \$50.00, for which they paid various rates. The first loan of \$500.00, included the two prior loans amounting to \$50.00, so that the net to defendant on January 6, 1937, should have been \$50.00. That, we account for the \$50.00 check, especially in view of Kessell's testimony that he received part of it and plaintiff received part of it, for the evidence is that the first loan was made from Kessell, and the second from plaintiff. Defendant did not receive, however, \$2,800.00 of the third loan. Another check of \$50.00, variously referred to parties seemingly without interest, was withheld from the defendant and accordingly, they received but \$1,250.00. The master found there had been paid \$50.00, which sum defendant plaintiff three was repaid. If the withdrawal, therefore, leads to the truthful balance found by the master, the master was the witness and heard their testimony and, while his findings are not given the same weight as the verdict of a jury or the decision of a chancellor who has had the same opportunity as the master, yet the latter's findings are entitled to due weight on review and we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. Friedrich v. W. H. Ill. Ill.

This is a case of procedure proceeding in equity. In our opinion the master conducted his hearings in a manner designed to arrive at the truth. He accomplished his objective despite

lack of assistance on the part of plaintiff and plaintiff's witnesses.

We need consider no other point. The evidence supports the master's findings and the decree entered by the chancellor is proper and is hereby affirmed.

DECREE AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.



lack of assistance on the part of Plaintiff and defendant.

Witnesses.

We need consider no other point. The evidence supports

the master's findings and the facts stated by the chancellor.

is proper and is hereby affirmed.

WITNESSES.

BURKE, J. J. AND HENRY, J. GORDON.

42139

ELIZABETH WEICK PETERS,

Appellee,

v.

CLARA GEHM, et al,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

320 I.A. 13721

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a foreclosure action with decree in plaintiff's favor. Defendants have appealed claiming certain credits and objecting to certain allowances. The defendant Frederick A. Gehm, husband of Clara and father of Frederick, Jr., died during pendency of the suit.

The mortgage note for \$4,500 was made October 14, 1918, due in three years at 5 per cent and by endorsement October 14, 1921, was extended three years at 6 per cent. October 14, 1927, in default, though the interest was paid, the note was extended by endorsement, and a separate agreement, for 5 years at 6 per cent and again October 12, 1932 for 5 years at 6 per cent. After reference the chancellor overruled exceptions to the master's report and ordered a lien in plaintiff's favor in the sum of \$9,071.27.

Among other items of indebtedness the master found the sum of \$400 interest due April 14, 1933, with interest thereon from that date at 6 per cent. Defendants objecting to this allowance, claim that the \$400 item represented a note given in payment of defaulted interest notes in October 1932. It appears that shortly before maturity in October of 1932, plaintiff, then in a hospital, agreed to a further extension in consideration of defendants' agreeing to pay the last 3 defaulted interest notes amounting to \$405, to enable plaintiff to pay her hospital bill. The extension was made and, thereafter, defendants instead of giving plaintiff cash, gave her the note for \$400 and \$5 cash. The master found that the note



ELIZABETH WICK

Defendants,

v.

CLARA GERM, et al.

Plaintiffs.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE KILLY DELIVERED THE OPINION OF THE COURT.

This is a foreclosure action with decree in plaintiff's

favor. Defendants have appealed claiming certain credits and  
 objecting to certain allowances. The defendant Frederick A. Germ,  
 husband of Clara and father of Frederick, Jr., died during pendency  
 of the suit.

The mortgage note for \$4,800 was made October 14, 1918,  
 due in three years at 6 per cent and by endorsement October 14, 1921,  
 was extended three years at 6 per cent. October 14, 1927, in default,  
 though the interest was paid, the note was extended by endorsement,  
 and a separate agreement for 5 years at 6 per cent and again October  
 12, 1932 for 5 years at 6 per cent. After reference the chancellor  
 overruled exceptions to the master's report and ordered a lien in  
 plaintiff's favor in the sum of \$9,071.87.

Among other items of indebtedness the master found the  
 sum of \$400 interest due April 14, 1933, with interest thereon from  
 that date at 6 per cent. Defendants objecting to this allowance,  
 claim that the \$400 item represented a note given in payment of  
 defaulted interest notes in October 1932. It appears that shortly  
 before maturity in October of 1932, plaintiff, then in a hospital,  
 agreed to a further extension in consideration of defendants' agreeing  
 to pay the last 3 defaulted interest notes amounting to \$405, to  
 enable plaintiff to pay her hospital bill. The extension was made  
 and, thereafter, defendants instead of giving plaintiff cash, gave  
 her the note for \$405 and 6 cash. The master found that the note

was a substitute for the defaulted interest notes and included the amount thereof with interest in the lien. Since plaintiff did not intend to receive the note at all, much less in payment of interest notes, the master's finding was proper. Baker v. Salzenstein, 314 Ill. 226; Illinois-Indiana Fair Ass'n. v. Phillips, 328 Ill. 368.

It appears that Clara Gehm and Frederick A. Gehm, Sr. were in the general real estate loan and insurance business, with Frederick, Jr. an associate. Plaintiff, in addition to the mortgage loan, loaned Frederick A. Gehm, Sr. and Clara:

March 20, 1928 . . . . .	\$1100.00
June 19, 1928 . . . . .	100.00
September 15, 1928 . . . . .	600.00
January 9, 1930 . . . . .	500.00
May 27, 1930 . . . . .	750.00

These loans were made on unsecured notes, all of which except the \$100 were payable to the order of plaintiff and her then husband, since deceased. Defendants claim that since plaintiff's husband did not endorse the notes, plaintiff could not enforce payment of them. This point is immaterial.

Defendants' principal contention is that numerous small monthly payments, rent, credits and certain advances, were not credited as payments on the mortgage note. The master found that a fiduciary relationship existed between the parties and that the monthly payments, credits and advances, amounting to \$2,044.50, should be applied upon the unsecured notes on the theory that because of the relationship, the payments ought in equity to be applied to plaintiff's greatest benefit, since equity regards as done what ought to be done.

The burden of proving the fiduciary relationship was in the first instance on plaintiff. If proved, defendants had the burden of showing that the sums represented by the receipts were actually intended as interest payments on the mortgage, since such an application was to their benefit. Pomeroy's Eq. Juris. (5th Ed) Vol. 3, Sec. 595. A fiduciary relationship may grow out of legal



was a substitute for the defaulted interest notes and included the amount thereof with interest in the item. These plaintiff did not intend to receive the note at all, much less in payment of interest noted the master's finding was proper. Faber v. Faber, 214 Ill.

225; Illinois-Indiana Fair Ass'n. v. Phillips, 228 Ill. 368.

It appears that Clara Gehm and Frederick A. Gehm, Sr. were in the general real estate loan and insurance business, with Frederick, Jr. an associate. Plaintiff, in addition to the mortgage loan, loaned Frederick A. Gehm, Sr. and Clara:

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These loans were made on unsecured notes, all of which except the \$100 were payable to the order of plaintiff and her then husband, since deceased. Defendants claim that since plaintiff's husband did not endorse the notes, plaintiff could not enforce payment of them. This point is immaterial.

Defendants' principal contention is that numerous small

monthly payments, rent, credits and certain advances, were not credited as payments on the mortgage note. The master found that a fiduciary relationship existed between the parties and that the monthly payments, credits and advances, amounting to \$2,044.80, should be applied upon the unsecured notes on the theory that because of the relationship, the payments ought in equity to be applied to plaintiff's present benefit, since equity regards as done what ought to be done.

The burden of proving the fiduciary relationship was in the first instance on plaintiff. If proved, defendants had the burden of showing that the sums represented by the receipts were actually intended as interest payments on the mortgage, since such an application was to their benefit. Pomeroy's Co. (Jury), 254 Ill. 2d 325. A fiduciary relationship may grow out of legal

relations and as well out of all cases where relations exist in fact, where confidence is imposed on one side and domination and influence result on the other. Seely v. Rowe, 370 Ill. 336. The evidence is

undisputed that for thirty years, since plaintiff came to this country, defendants handled plaintiff's fiscal affairs, made investments, collected mortgage payments, purchased property for her and borrowed considerable sums of money on secured and unsecured notes from her. These facts show that defendants were her agents and that she reposed confidence in them. The fiduciary relationship was established and defendants had the burden of proving the intended application of the payments.

The disputed receipted payments were evidenced by contemporary records, receipts signed by plaintiff and retained by defendants and notations on sheets of paper kept by plaintiff. Recitals in the receipts and the notations on the paper were written by defendants. Prior to this system of recording payments, interest payments on the unsecured notes were recorded by endorsements by defendants thereon. So far as the record shows no action was ever taken by plaintiff on the apparently defaulted unsecured notes. Plaintiff's record of the payments following discontinuance of the endorsement practice, indicates that an accounting was had on August 14, 1935 when plaintiff moved into property owned by defendants where her rent and other items were sometimes credited as interest payments. The accounting shown in a statement typewritten by Clara Gehm is on the first page of plaintiff's records. This statement lists the unsecured notes, the amount of interest accumulated and due since the discontinuance of the endorsement practice, credit of \$490 in defendants' favor and against the total due, and a balance due plaintiff of \$201.50. Immediately thereunder begins the record of the hand written notations of cash payments with no statement of their intended application and no description of the



relations and as well out of all cases where relations exist in fact, where confidence is imposed on one side and domination and influence result on the other. See v. How, 270 Ill. 338. The evidence is undisputed that for thirty years, since plaintiff came to this country, defendants handled plaintiff's financial affairs, made investments, collected mortgage payments, purchased property for her and borrowed considerable sums of money on secured and unsecured notes from her. These facts show that defendants were her agents and that she reposed confidence in them. The fiduciary relationship was established and defendants had the burden of proving the intended application of the payments.

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payments as interest. The contemporaneous receipts of the same payments held by defendants, recite on their faces that the payments are for interest on the mortgage loan. There is, accordingly, an ambiguity between these evidences of defendants' payments, both of which were prepared by Clara Gehm. Plaintiff says the payments were to be applied on the unsecured notes.

Defendants insist that the recitals in the receipts are conclusive. A written receipt is evidence of the highest and most satisfactory character, but may be explained by parol, (Winchester v. Grosvenor, 44 Ill. 425), especially where there is ambiguity and defendants have the unusual burden of fiduciaries. While plaintiff was imprudent in signing the receipts without reading them, as she says she did, under the circumstances here, we believe the master properly resolved the ambiguity against defendants for they did not show, as it was their burden, by a preponderance of the evidence that these small payments were intended to apply on the mortgage.

We believe the finding of the master and the decree are supported by the evidence and are in accordance with equitable principles and the decree is hereby affirmed.

DECREE AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.



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Defendants insist that the receipts in the receipts are conclusive. A written receipt is evidence of the highest and most satisfactory character, but may be explained by parol. (Manchester v. Groves, 44 Ill. 426), especially where there is ambiguity and defendants have the unusual burden of disproof. While Plaintiff was imprudent in signing the receipts without reading them, as she says she did, under the circumstances here, we believe the master properly resolved the ambiguity against defendants for they did not show, as it was their burden, by a preponderance of the evidence, that these small payments were intended to apply on the mortgage. We believe the finding of the master and the decree are

supported by the evidence and are in accordance with equitable principles and the decree is hereby affirmed.

DECREES AFFIRMED.

HURK, P. J. AND KERN, J. CONCUR.

42231

ANNA SUNDBERG,  
v. Plaintiff - Appellee,

AYRES BOAL, SR., MARCELLA BENNETT KIRKLAND,  
and JEAN ANDRE GOURGUECHON (Also known as  
Pierre Andre),  
Defendants,

On Appeal of JEAN ANDRE GOURGUECHON,  
Appellant.

320 I.A. 138<sup>1</sup>

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for plaintiff for \$1,200. Defendants Boal and Kirkland were dismissed at the trial and Gourguechon appeals.

August 9, 1939, plaintiff having had her hair treated in defendant's beauty parlor in Winnetka, Illinois, fell and broke her left wrist on her way out of the establishment. She alleged due care, negligent operation of the Shop which allowed soapy water to remain on a heavily waxed linoleum aisle, by reason of which she slipped and was injured. Defendant denied due care; negligent operation; allowing soapy water to remain in the aisle; that the aisle was heavily waxed, or slippery, or dangerous; or her injury on his account.

Two special interrogatories were submitted to the jury: Did defendant or his employees know, or should they have known, before the accident that water was on the floor?. and, Was plaintiff in the exercise of due care? Both were answered in the affirmative.

The first point raised is that there is no evidence which tends to prove defendant's negligence and defendant contends that the trial court should have directed a verdict for him and given him a judgment notwithstanding the verdict. On this point we shall confine our examination of the evidence to the determination whether there is any evidence which, with its proper inferences, considered most



WMA BUREAU

Plaintiff - Defendant

v.

ALICE BOAL, et al., MARCELLA MURPHY, et al.,  
and JAMES MURPHY (as known as  
Plaintiffs),  
Defendants.

On appeal of JAMES MURPHY, et al.

Appellant.

MR. JUSTICE KELLY delivered the opinion of the court.

This is a personal injury action with verdict and judgment for plaintiff for \$1,000. Defendants Boal and Kirkland were dismissed at the trial and benchman appeals.

August 2, 1933, plaintiff having had her hair treated in defendant's beauty parlor in Winnetka, Illinois, fell and broke her left wrist on her way out of the establishment. The alleged due care, negligent operation of the shop which allowed soap water to remain on a heavily waxed linoleum aisle, by reason of which she slipped and was injured. Defendant denied due care; negligent operation; allowing soap water to remain in the aisle; that the aisle was heavily waxed, or slippery, or dangerous; or her injury on his account.

Two special interrogatories were submitted to the jury:

Did defendant or his employees know, or should they have known, before the accident that water was on the floor? and, Was plaintiff in the exercise of due care? Both were answered in the affirmative.

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3301A133

WMA BUREAU

CIRCUIT COURT

COOK COUNTY

10/1/33

favorable to plaintiff, tends to prove her case. There is evidence that plaintiff was walking from the rear or North end of the Shop, carrying a bag and a pair of shoes in her left hand, and fell in the "working room" which was "very dark", in front of the manicuring table, having stepped in soapy water on a "very slippery, heavily waxed linoleum" and "fell so fast she did not know what happened"; that the water in the spot was 4 inches in diameter and about one-fourth of an inch deep; of the use of soapy water in the manicuring process; of the preparation of soapy water for manicures at the rear end of the Shop in the "dispensary"; of carrying of the soapy water from the dispensary in bowls or trays to the working room for the manicures; and that a bowl is sometimes knocked over by a clumsy patron.

We think there is ample evidence with legal inferences which tends to prove defendant's negligence and, accordingly, the action of the trial court in denying the motions for directed verdict and judgment notwithstanding the verdict, was proper.

Defendant says it is undisputed that no employee put the water on the floor or did anything to cause its presence there, or knew it was there; and that it was not there sufficiently long to give notice and cites Davis v. South Side El. R. R. Co. 292 Ill. 378; Antibus v. W. T. Grant Company, 297 Ill. App. 363 and Mader v. Mandel Bros., 314 Ill. 263 in support of his position. Plaintiff contends those cases are distinguishable because in them, persons other than defendant's employees may have caused the substance to be where it was to cause the injury, while in the case before us, no one but the employees could have done so. [We agree with plaintiff that since there was evidence of soapy water on the floor, and incidentally this evidence was not contradicted, there is no way reasonably conceivable that soapy water could have been in the aisle, other than through the agency of defendant's employees. It follows, therefore, that there was no need for plaintiff to prove that defendant had or should have had notice of the presence of the soapy water on the floor.] Pabst v. Hillman's 293 Ill. App. 547; Kroger Grocery & Baking Co. v. Diebold, 276 Ky.



favorable to plaintiff, tends to prove her case. There is evidence that plaintiff was walking from the rear or North end of the Shop, carrying a bag and a pair of shoes in her left hand, and fell in the "working room" which was "very dark", in front of the manouring table, having stepped in soapy water on a "very slippery, heavily waxed linoleum" and "fell so fast she did not know what happened"; that the water in the spot was 4 inches in diameter and about one-fourth of an inch deep; of the use of soapy water in the manouring process; of the preparation of soapy water for manouring at the rear end of the Shop in the "dispensary"; of carrying of the soapy water from the dispensary in bowls or trays to the working room for the manouring; and that a bowl is sometimes knocked over by a clumsy person.

We think there is ample evidence with legal inferences which tends to prove defendant's negligence and, accordingly, the action of the trial court in denying the motion for directed verdict and judgment notwithstanding the verdict, was proper.

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on the floor or did anything to cause its presence there, or knew it was there; and that it was not there sufficiently long to give notice and cites Davis v. South Side M. R. Co., 202 Ill. 378; Antoine v. W. T. Grant Company, 207 Ill. App. 363 and Mader v. Mandel Bros., 214 Ill. 263 in support of his position. Plaintiff contends those cases are distinguishable because in them, persons other than defendant's employees may have caused the substance to be where it was to cause the injury, while in the case before us, no one but the employees could have done so. We agree with plaintiff that since there was evidence of soapy water on the floor, and incidentally this evidence was not contradicted, there is no way reasonably conceivable that soapy water could have been in the aisle, other than through the agency of defendant's employees. It follows, therefore, that there was no need for plaintiff to prove that defendant had or should have had notice of the presence of the soapy water on the floor. Pabal v. Williams, 202 Ill. App. 247; Kreger Grocery & Baking Co. v. Diebold, 278 Ky.

349, 124 S. W. (2) 505; Sears, Roebuck & Co. v. Peterson, 76 Fed. (2d) 243.

Defendant says he has definitely shown that none of his employees could or might have caused it. This contention is based on the fact that several defense witnesses, employees of defendant testified that no manicures had been given before plaintiff's injury on that day and that soapy water is used only in manicures. This question was for the jury. They had the evidence of plaintiff that there was soapy water; and the defense evidence that there were no manicures given and soapy water used for no other purpose, leaving the inference for the jury that there was no soapy water. There is no denial that the water was soapy and no affirmative testimony that it was not water, although a defense witness related an alleged conversation with plaintiff which infers that plaintiff herself caused the wet spot. The jury's province was to weigh these conflicting, contradictory theories.

Defendant says the testimony that there were no manicures given that morning differentiates this case and the Sears Roebuck case. It is true that in that case the defendant's employees did not testify on the question, how the injurious substance came to be on the floor, but that difference does not preclude applying that case to the question whether plaintiff here was required to prove actual or constructive notice on the part of the defendant.

Defendant complains of the giving of plaintiff's instruction number 4, which stated that plaintiff was required to prove by a preponderance of the evidence that defendant knew of the presence of the water or that it had been there for such a period or got there under such circumstances that it might be inferred that defendant or his employees could have learned of its presence by the exercise of due care. Defendant says there is no evidence that any employee did anything to cause the water to be there. There is the inference - which is enough upon which to base the instruction. We think the



349, 124 S. W. (2) 508; Sears, Roebuck & Co. v. Peterson, 75 Fed. (2d)

245.

Defendant says he has definitely shown that none of his employees could or might have caused it. This contention is based on the fact that several defense witnesses, employees of defendant testified that no mauls had been given before plaintiff's injury on that day and that sappy water is used only in mauls. This question was for the jury. They had the evidence of plaintiff that there was sappy water; and the defense evidence that there were no mauls given and sappy water used for no other purpose, leaving the inference for the jury that there was no sappy water. There is no denial that the water was sappy and no affirmative testimony that it was not water, although a defense witness related an alleged conversation with plaintiff which infers that plaintiff herself caused the wet spot. The jury's province was to weigh these conflicting, contradictory theories.

Defendant says the testimony that there were no mauls given that morning differentiates this case and the Sears Roebuck case. It is true that in that case the defendant's employees did not testify on the question, how the injurious substance came to be on the floor, but that difference does not preclude applying that case to the question whether plaintiff here was required to prove actual or constructive notice on the part of the defendant.

Defendant complains of the giving of plaintiff's instruction number 4, which stated that plaintiff was required to prove by a preponderance of the evidence that defendant knew of the presence of the water or that it had been there for such a period or not there under such circumstances that it might be inferred that defendant or his employees could have learned of its presence by the exercise of due care. Defendant says there is no evidence that any employee did anything to cause the water to be there. There is the inference which is enough upon which to base the instruction. We think the

instruction was properly given because according to the cases herein-  
before cited, deciding the point, the rule is that where the  
circumstances show that the presence of the substance was possible  
only through the agency of defendant or his employees, he is charged  
with the knowledge of its presence, for the law presumes that an actor  
knows the consequence of his acts.

The jury found in a special verdict that the defendant or  
his employees knew or should have known before the accident that  
water was on the floor. Defendant says that neither the court nor  
jury should surmise that the water reached the floor in some  
unexplained way, whereby defendant's negligence might be inferred.  
In this case we think that the inference of defendant's negligence is  
not unreasonable.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.



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before cited, deciding the point, the rule is that where the  
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The jury found in a special verdict that the defendant or  
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water was on the floor. Defendant says that neither the court nor  
jury should surmise that the water reached the floor in some  
unexplained way, whereby defendant's negligence might be inferred.  
In this case we think that the inference of defendant's negligence is  
not unreasonable.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. AND HERBEL, J. CONCUR.

42270

ROSE E. CAMPBELL,

Appellant,

v.

GOLDBLATT BROTHERS, INC., a  
corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

320 I.A. 138

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action in which judgment was entered for defendant notwithstanding a verdict in plaintiff's favor for \$12,000.00. Plaintiff appeals.

Plaintiff, a housewife, of 44 years of age and mother of four children, was injured September 16, 1938 in Goldblatt Brothers, Inc. department store located at State and Van Buren streets, Chicago. She was shopping, boarded an escalator descending from the first floor to the basement and the accident occurred at or near the basement floor.

Her original complaint stricken, plaintiff filed an amended complaint alleging due care; duty of defendant to provide a safe and proper place for her and other passengers on the escalator; duty of defendant to exercise the highest degree of care consistent with the practical operation of the escalator; and that her clothes became entangled because of defendant's breach of duty; and that while entrapped she was injured. She further charged the defendant specifically with allowing jerky operation of the escalator; throwing another woman passenger to the steps, contributing to plaintiff's injury; failing to provide proper guards against entanglement of women's clothes; failing to provide guards or brakes to stop escalators when plaintiff's peril became apparent; and failing to provide automatic switches or brakes to stop the escalator. The answer admits the duties but denies breach, denies plaintiff's due care or negligence or that the injuries resulted from its negligence. A trial was had on those issues and a verdict and judgment for plaintiff was entered on November 21, 1941.



3301.A.138

42370

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

ROSE E. CAMPBELL,  
Appellant,  
v.  
GOLDBLATT BROTHERS, INC.,  
Corporation,  
Appellee.

MR. JUSTICE KILLY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action in which judgment was

entered for defendant notwithstanding a verdict in plaintiff's favor  
for \$12,000.00. Plaintiff appeals.

Plaintiff, a housewife of 44 years of age and mother of  
four children, was injured September 12, 1938 in Goldblatt Brothers,  
Inc. department store located at State and Van Buren streets, Chicago.

She was shopping, boarded an escalator descending from the first

floor to the basement and the accident occurred at or near the

basement floor.

Her original complaint attacked, plaintiff filed an amended

complaint alleging due care; duty of defendant to provide a safe and

proper place for her and other passengers on the escalator; duty of

defendant to exercise the highest degree of care consistent with

the practical operation of the escalator; and that her clothes became

entangled because of defendant's breach of duty; and that while

entrapped she was injured. She further charged the defendant specific-

ally with allowing jerky operation of the escalator; throwing another

woman passenger to the steps, contributing to plaintiff's injury;

failing to provide proper guards against entanglement of women's clothes;

failing to provide guards or brakes to stop escalators when plaintiff's

peril became apparent; and failing to provide automatic switches or

brakes to stop the escalator. The answer admits the duties but denies

breach, denies plaintiff's due care or negligence or that the injuries

resulted from its negligence. A trial was had on those issues and a

verdict and judgment for plaintiff was entered on November 21, 1941.

Plaintiff, after verdict, was given leave to file her second amended complaint charging the negligent operation of the escalator in violation of Chapter 79, Section 149 of the Chicago Code, which provided among other things that an emergency stop button accessible to the public should be conspicuously located at the top and bottom of each escalator landing and be marked in capital letters.

Defendant moved to strike these additional charges and for judgment notwithstanding the verdict. The only ground for the latter motion to be considered is that there was no evidence with proper inferences tending to prove plaintiff's case. The court struck the second amended complaint and entered judgment for defendant.

There is evidence in plaintiff's case that the ordinance was violated because her investigator said that the stop button was not conspicuous or accessible. Defendant's witness, a photographer, likewise testified that though he took photographs of the bottom landing, he could not see the stop button. Just before resting plaintiff's case, counsel asked the court to take judicial notice of the ordinance. To meet the objection raised that the ordinance had not been pleaded, plaintiff offered the amendment which the court permitted filed, but later struck, presumably because of defendant's surprise and disadvantage. Plaintiff offered a copy of the ordinance in evidence, objection was made, and the court said it would rule later. The record shows no ruling, but indicates the court would not have permitted the copy in evidence and while the court stated that it would not give an instruction for plaintiff thereon, such an instruction apparently was given. Near the end of defendant's argument for a directed verdict at the close of plaintiff's case, the court stated that if the case went to a jury, any verdict for the plaintiff would have to be set aside.

Defendant does not complain that the first amended complaint did not state a cause of action. It does complain that the second amended complaint states a new cause of action and, that since two



Plaintiff, after verdict, was given leave to file her second

amended complaint charging the negligent operation of the escalator in violation of Chapter 70, Section 140 of the Chicago Code, which provided among other things that an emergency stop button accessible to the public should be conspicuously located at the top and bottom of each escalator landing and be marked in capital letters.

Defendant moved to strike these additional charges and for judgment notwithstanding the verdict. The only ground for the latter motion to be considered is that there was no evidence with proper inferences tending to prove plaintiff's case. The court struck the second amended complaint and entered judgment for defendant.

There is evidence in plaintiff's case that the ordinance was violated because her investigator said that the stop button was not conspicuous or accessible. Defendant's witness, a photographer, likewise testified that though he took photographs of the bottom landing, he could not see the stop button. Just before testing plaintiff's case, counsel asked the court to take judicial notice of the ordinance. To meet the objection raised that the ordinance had not been pleaded, plaintiff offered the amendment which the court permitted filed, but later struck, presumably because of defendant's surprise and disadvantage. Plaintiff offered a copy of the ordinance in evidence, objection was made, and the court said it would rule later. The record shows no ruling, but indicates the court would not have permitted the copy in evidence and while the court stated that it would not give an instruction for plaintiff therein, such an instruction apparently was given. Near the end of defendant's argument for a directed verdict at the close of plaintiff's case, the court stated that if the case went to a jury, any verdict for the plaintiff would have to be set aside.

Defendant does not complain that the first amended complaint did not state a cause of action. It does complain that the second amended complaint states a new cause of action and, that since two

years had elapsed following the accident, the amendment was properly stricken; that not having cited the ordinance in the original complaint in accordance with Rule 13 of the Supreme Court, it was not properly pleaded, plaintiff did not rely on it and, consequently, it was a new cause of action; and that plaintiff departed from the jerking theory, stated in the first amended complaint. There is no evidence of jerking and plaintiff's attention to the other woman, was drawn by the latter's scream, consequently, there is no evidence to support that charge in the complaint. We believe that evidence of the ordinance was not a wide variance, if any, for under her specific charges plaintiff complains that defendant failed to provide brakes to stop the escalator after her plight became apparent to defendant and failed to provide automatic brakes to prevent injuries to passengers. Under the liberal policy of pleading in this State, we believe that those specific charges alleged in substance the violation of the ordinance and under our liberal policy of amendments, the amendment filed should not have been stricken, and since we fail to see how defendant was prejudiced, we conclude that the trial court in entering the order which struck the pleading, abused its discretion. There is no record of any request by defendant for delay, when confronted by the ordinance, nor so far as the record shows any objection to the testimony of plaintiff's investigator with respect to the stop button; and furthermore defendant's photographer, as well as other defense witnesses testified on the question of the conspicuousness and accessibility of the button. We cannot see either that the defendant's case would have been presented in any other manner if given a delay, or, for that matter, whether there would have been any substantial difference in its pleading or defense if the ordinance had been specifically referred to in the complaint. Defendant says if it had been pleaded, it could have answered that it was complying. That was its evidence. Plaintiff's investigator testified to the presence



years had elapsed following the accident, the amendment was properly  
stricken; that not having cited the ordinance in the original complaint  
in accordance with Rule 13 of the Supreme Court, it was not properly  
pleaded, plaintiff did not rely on it and, consequently, it was a non  
cause of action; and that plaintiff departed from the Jerkin theory,  
stated in the first amended complaint. There is no evidence of Jerkin  
and plaintiff's attention to the other woman, was drawn by the latter's  
scream, consequently, there is no evidence to support that charge in  
the complaint. We believe that venue of the ordinance was not a  
wide variance, if any, for under her specific charges plaintiff complains  
that defendant failed to provide brakes to stop the escalator after her  
slight became apparent to defendant and failed to provide automatic  
brakes to prevent injuries to passengers. Under the liberal policy of  
pleading in this state, we believe that those specific charges alleged  
in substance the violation of the ordinance and under our liberal  
policy of amendments, the amendment filed should not have been stricken,  
and since we fail to see how defendant was prejudiced, we conclude  
that the trial court in entering the order which struck the pleading,  
abused its discretion. There is no record of any request by defendant  
for delay, when confronted by the ordinance, nor so far as the record  
shows any objection to the testimony of plaintiff's investigator with  
respect to the stop button; and furthermore defendant's motion, whether,  
as well as other defense witnesses testified on the question of the  
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it had been pleaded, it could have answered that it was complying. That  
was the evidence. Plaintiff's investigator testified to the presence

of a button, but that it was inconspicuous and inaccessible. He was not plaintiff's last witness and the testimony plainly indicates plaintiff's intention and theory under the first amended complaint, and negatives any idea of an afterthought. This witness was cross-examined at length in a manner which indicates that defendant must have surmised plaintiff's theory of violation of the ordinance. The amendment was offered aptly, included a claim which we think was plainly intended to be brought in the first amended complaint, grew out of the same transaction, and should not have been stricken. Metropolitan Trust Co. v. Bowman Dairy, 369 Ill. 222.

The parties do not dispute the rule which controls the question of the propriety of a judgment notwithstanding the verdict. Defendant, however, persistently argues that there is no evidence that any negligence of defendant's caused plaintiff's fall; and that plaintiff's own witness Taylor, refutes plaintiff's claim that while she was entangled after the fall, she could have been injured by the descending steps, or that defendant had not operated the escalator properly and in accordance with the ordinance. Defendant also argues the question of manifest weight. We shall disregard the testimony of Taylor where unfavorable to plaintiff, and are not concerned with the question of manifest weight. Our sole inquiry will be for evidence and proper inferences favorable to plaintiff. That evidence is that plaintiff heard a scream and saw a lady had fallen at the bottom of the escalator; tried to back up but was carried down by the descending steps into the woman; that her coat caught and she was held entangled while the descending steps struck her in the back for more than four minutes while the other woman was screaming; that there were clerks and other persons near the bottom of the escalator; that an investigator found the stop inaccessible and inconspicuous in violation of an ordinance; that a photographer who took pictures at the bottom of the escalator did not see the stop button; that if a coat became



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not plaintiff's last witness and the testimony plainly indicates

plaintiff's intention and theory under the first amended complaint,

and negatives any idea of an afterthought. This witness was cross-

examined at length in a manner which indicates that defendant must have

survived plaintiff's theory of violation of the ordinance. The

amendment was offered aptly, included a claim which we think was plainly

intended to be brought in the first amended complaint, grew out of

the same transaction, and should not have been stricken. Metropolitan

Trust Co. v. Fowler, 259 Ill. 222.

The parties do not dispute the rule which controls the

question of the propriety of a judgment notwithstanding the verdict.

Defendant, however, separately argues that there is no evidence that

any negligence of defendant caused plaintiff's fall; and that plain-

tiff's own witness Taylor, relieves plaintiff's claim that while she was

entangled after the fall, she could have been injured by the descending

steps, or that defendant had not operated the escalator properly and

in accordance with the ordinance. Defendant also argues the question

of manifest weight. We shall disregard the testimony of Taylor where

unfavorable to plaintiff, and are not concerned with the question of

manifest weight. Our sole inquiry will be for evidence and proper

inference favorable to plaintiff. That evidence is that plaintiff

heard a scream and saw a body had fallen at the bottom of the

escalator; tried to back up but was carried down by the descending

steps into the woman; that her coat caught and she was held entangled

while the descending steps struck her in the back for more than four

minutes while the other woman was screaming; that there were clerks

and other persons near the bottom of the escalator; that an investi-

gator found the steps inaccessible and inconspicuous in violation of

an ordinance; that a photographer who took pictures at the bottom of

the escalator did not see the top button; that if a coat became

entangled in the escalator, the machinery would stop; that plaintiff had to be taken out of her coat before the coat could be removed; and that the escalator was still moving when she was taken out of her coat.

We believe that the foregoing evidence and the proper inferences to be drawn therefrom, considered in the light most favorable to plaintiff, clearly tends to prove her case. We are bound to consider no further points and for the reasons herein given the judgment is reversed and the cause is remanded for a ruling on defendant's motion for a new trial. Goodrich v. Sprague, 376 Ill. 80.

JUDGMENT REVERSED AND CAUSE REMANDED.

BURKE, P.J. AND HEBEL, J. CONCUR.



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JUDGMENT REVERSED AND CASE REMANDED.

BURKE, P.J. AND HERBELL, J. CONCUR.

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GEN. NO. 9833

AGENDA NO. 1

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DAY TERM, A. D. 1943

FRED J. HINTZE,

APPELLEE.

vs.

FRED BURREN, ET AL.,

(FRED BURREN,

APPELLANT)

APPEAL FROM THE CIRCUIT  
COURT OF DuPAGE COUNTY.

HUFFMAN, P. J.

Appellee instituted this suit against appellant and his truck driver to recover for personal injuries and property damage resulting from a collision between appellee's automobile and appellant's truck. The jury returned a verdict for appellee against appellant and his truck driver in the sum of \$3,000. Appellant brings this appeal from judgment rendered thereon.

All of the various and usual errors are assigned for reversal, among which is the contention that the verdict is contrary to the evidence.



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The accident occurred on October 4, 1940, at about 11:30 at night, on Route #54, near Hinsdale. The highway was a divided, four-lane, cement road, with two traffic lanes for the north bound travel, and two traffic lanes for the south bound travel. The parkway dividing the north bound from the south bound travel appears to be approximately ten feet in width.

Appellant's truck driver was proceeding north and in the east or outside traffic lane. As he was thus traveling on Route #54, he came to a slight up-grade. The motor failed, and he applied the brakes in order to hold the truck. The driver states that he placed a lighted flare alongside the cab of the truck, and another one approximately one hundred feet behind the truck, and in the same traffic lane occupied by the truck. He says that after placing the flares, he and his helper started to examine the engine to see if they could discover the trouble; that two or more cars passed them, on the inner traffic lane; that his helper was holding a flashlight, while he was engaged in examining the engine, when appellee's car collided with the rear of the truck. This witness further states that the front and rear lights on the truck were lighted at the time; that in addition to the tail-lights, there were other lights across the top of the truck; and that the flares were burning after the collision.

His testimony is corroborated by the helper, who says the engine failed on the up-grade, whereupon the driver dismounted, lighted the flares, and placed them as above stated; that two cars passed following the placing of the



[illegible]

flares, proceeding north in the inner traffic lane; that the driver of the truck began to examine the motor; that he was holding a flashlight for him; that soon thereafter the collision in question occurred, which knocked them both off the fender of the truck; that he immediately arose and ran back to the rear of the truck; that the lights on the truck were then burning, except such as were knocked off by the collision; that the flare at the rear was burning as well as four red lights on the back of the truck; that immediately after the accident, two girls and two soldiers came up in a car; and that soon after, the police officer arrived. This witness states the flare at the rear of the truck was placed in the east or outer lane of the north bound highway, and that when the police officer arrived, all the lights were just as they were immediately after the accident, and were in the same condition as prior to the accident except such as had been knocked out in the collision.

The witness, Jean Fraser, states that she is a student at the University of Wisconsin. She was one of the occupants of the car with the two soldiers that came upon the scene of the accident immediately after its occurrence. She says her attention was directed solely toward appellee; and that upon request of the truck driver, they took him to the police station at Villa Park, in order that he might report the accident.

Another occupant of the car in which the soldiers were riding, was Sally Pierson. She states that as they approached





the scene of the accident from the south, she saw a red flare in the pavement; that as they approached the point in question, they saw the wreck; that the flare in the pavement was about one hundred feet back of the truck; that she saw another flare along the side of the truck; that they took the truck driver to the police station at Villa Park, upon his request; that they then returned to the scene of the accident; that appellee was still in his car and had not yet been removed; that soon after her return, the police officer came, when appellee was removed from his car and sent to the hospital in an ambulance.

The foregoing briefly summarizes the evidence on behalf of appellant with respect to the existing conditions at the time of the collision.

The plaintiff testified that he was proceeding north on the highway in question, at about forty-five miles per hour; that the lights of cars traveling south, over on the south bound traffic lanes, had affected his vision; that he did not see any lights ahead of him on the highway he was traveling; that he saw no flares; that he saw no lights on the truck; and that he did not see the truck until he was upon it. The next thing the plaintiff remembers is when he regained consciousness in the hospital.

Plaintiff called five witnesses consisting of a doctor, a nurse, a garage man, and a man who testified relative to damage to his car. None of these were at the scene of the accident, except the garage man, who was sent out to get the car. The fifth witness was a deputy sheriff of the county.





He was on duty in the squad car at the time, and immediately went to the scene of the accident. He states that he found plaintiff's car had collided with the rear of appellant's truck; that the driver of the truck at that time was not present; that plaintiff was still in his car behind the steering wheel, and unconscious. He says that as he approached the scene of the accident, he saw a flare burning in the traffic lane behind the truck. He approached from the south, which was the same way traveled by appellee. He says he first saw the flare at least seven hundred feet away, and that when he reached the scene of the accident, he found tail lights burning on appellee's car, and on the rear of the truck.

The above constitutes the evidence on behalf of appellee with respect to the circumstances surrounding the accident. Under appellee's testimony, he saw no flares, no lights, and no truck until he was upon it. His witness, the deputy sheriff, states he saw the flare seven hundred feet away, and upon reaching the accident, found the tail lights in operation on appellee's car and appellant's truck. The deputy sheriff came from the same direction appellee was traveling. In addition to the two men on the truck who testified about placing flares, is the testimony of the witness, Sally Pierson, who states she saw a flare burning in the pavement as they approached from the south, and that it was about one hundred feet back of the truck. She also saw lights on the rear of



[illegible]

the truck. The car in which she was riding was the first to reach the place of the accident. It is our conclusion that the verdict is against the weight of the evidence.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.



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Page 100

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

320 I.A. 140

May Term, A. D. 1943

RICHARD C. WASHINGTON, Administra-  
tor of the Estate of Lawrence  
William Washington, Deceased,

Appellee

vs.

LEON PETERSON,

Appellant

APPEAL FROM  
CIRCUIT COURT OF  
WINNEBAGO COUNTY.

DOVE, J:

Appellee recovered a judgment for \$5,000.00 against appellant in the circuit court of Winnebago County, on account of the death of his intestate from an automobile accident, and this appeal followed.

Appellant contends that there is no evidence in the record upon which the verdict or judgment could be predicated, that the verdict is against the manifest weight of the evidence and that the evidence shows that appellant's intestate came to his death by his own contributory negligence.

The accident happened at about 8:45 P. M. on August 4, 1939, at a point about one and one-half miles north of Pecatonica on State Highway No. 18, which is a cement pavement eighteen feet wide. Appellee's intestate, a boy eighteen years of age, was driving from his father's farm south toward Pecatonica, in a pick-up farm truck, accompanied by three other boys, all riding on the one seat of the cab.



IN THE

3892 L.A. 140

SECOND DISTRICT

1 y Term, A. D. 1933

STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

LEON PETERSON, Appellant  
vs.  
Appellee  
RICHARD C. WASHINGTON, Administrator of the Estate of Lawrence William Washington, deceased.

DOVE, 1:

Appellee recovered a judgment for \$3,000.00 against appellant in the circuit court of Kingsburg County, on account of a verdict of his intestate from an automobile accident, and the verdict followed. Appellant contends that there is no evidence in the record upon which the verdict of the jury could be sustained, that the evidence is against the verdict and that the evidence and that the evidence shows that appellant's intestate came to his death by his own contributory negligence.

The accident happened at about 3:45 P. M. on August 4, 1930, at a point about one and one-half miles north of Postonville on State Highway No. 12, which is a cement pavement eighteen feet wide. Appellant's intestate, a boy eighteen years of age, was driving from his father's home south toward Postonville, in a pick-up farm truck, accompanied by three other boys, all riding on the one seat of the car.

Three of them, including the decedent, were going to town to have their hair cut. Appellant was driving a farm truck in a northerly direction. The country was rolling and as appellee's intestate came up over a hill and started down the other side he met appellant. Attached to the farm truck which appellant was driving was a trailer on which there was a hay rack eight feet wide. Two other men were riding with appellant on the seat of his truck cab. Appellant's truck was proceeding in second gear at about twenty miles per hour. The decedent's truck was running at about forty to forty-five miles per hour, according to the witnesses for appellee, and at fifty miles per hour, according to one of appellant's witnesses. All the witnesses agree that prior to the accident appellant's truck was proceeding in a straight line. The head lights on the decedent's truck were turned on. Appellant's truck would show both head lightslighted when they were dimmed, but only the right hand head light would light when they were turned to bright. The two men who were riding with appellant testified that both lights on his truck were lighted when they left Pecatonica. The witnesses for appellee testified that as appellant's truck came up the hill toward them it showed only the right hand head light burning and there is no testimony to the contrary.

The trailer on which the hay rack rode was attached to the back end of appellant's truck by an ordinary wagon tongue, with a "hitch" on the back end of the truck. The hay rack was about two feet high, with sides straight up, and the bottom of the rack was about two feet above the pavement. The tread of appellant's truck was about four feet wide and the hay rack extended about two feet beyond the tread on each side. There was no light on the hay rack, and when appellant left Pecatonica, one of the men with him offered to stand on the hay rack and hold a flash light, but appellant told him he did not have to do that.



Three of them, including the decedent, were going to look to have their hair cut. Applicant was driving a farm truck in a northerly direction. The country was rolling and the decedent's truck was up over a hill and started down the other side in the northeast. Attached to the farm truck which applicant was driving was a trailer on which there was a hay rack eight feet high. Two other men were riding with applicant on the seat of the truck cab. Decedent's truck was proceeding in a southerly direction at about twenty miles per hour. Decedent's truck was heading to about forty to forty-five miles per hour, according to the witnesses for applicant, and at fifty miles per hour, according to one of applicant's witnesses. All the witnesses agree that prior to the accident applicant's truck was proceeding in a straight line. The head lights on the decedent's truck turned on. Applicant's truck would have had headlights on when they were dimmed, but only the right side head light would light when they were turned to bright. The two men who were riding with applicant testified that both lights on the truck were lighted when they left Peetsonice. The witnesses for applicant testified that as applicant's truck came up the hill toward them it showed only the right hand head light burning and there is no testimony to the contrary. The trailer on which the hay rack was attached to the back end of applicant's truck by an ordinary wagon tongue, with a "hook" on the back end of the truck. The hay rack was about two feet high, with sides straight up, and the bottom of the rack was about two feet above the pavement. The front of applicant's truck was about four feet wide and the hay rack extended about two feet beyond the front on each side. There was no light on the hay rack, and when applicant left Peetsonice, one of the men with him offered to stand on the hay rack and hold a flashlight, but applicant told him he did not want to do that.

There was a collision on the hill. The truck which appellee's intestate was driving turned over two or three times, and his body was found near the west edge of the pavement. The tongue of the trailer attached to appellant's truck was broken off about three or four feet from the hitch on the back of the truck, and the body of the hay rack was on the shoulder across the road from decedent's body. The hub cap on the left rear wheel of each truck was knocked off, and the left rear fender of appellant's truck was slightly bent and dented. No other part of appellant's truck was injured. Photographs in evidence show that the hay rack collided with the left front fender of the truck driven by appellee's intestate, and ripped through the hood and windshield. The decedent's body showed deep lacerations about the upper portion of each hip bone, both bones of the left fore-arm were fractured, the left leg was turned outward, the pulmonary artery was occluded with blood and the spleen, liver and the attachment of the small intestine were torn. There was also blood about the brain, and extensive hemorrhage into the space where the kidneys were located. The character of these wounds tends to support appellee's theory that they were produced by the hay rack.

Two of the boys who were riding with the decedent testified that his truck was west of the black centerline of the pavement as they approached appellant's truck; that the latter appeared to be directly in front of them, and that the decedent swerved to the right to avoid hitting it, but that the hay rack caught their truck. Both of them testified that the left wheel of appellant's truck was approximately on the center line of the pavement. The two men who were riding with appellant testified that his truck was on the east side of the center line of the pavement. One of them testified he remembered where the east wheels of the truck were, because he threw a match out and it went



[illegible]

right into the grass on that side; and that as the decedent's truck got in front of them it turned to the left very abruptly.

Appellant stresses the fact that one of appellee's witnesses, in first describing the accident, said: "We came over top of the hill, starting down; other vehicle coming up. We ran into side of truck," as indicating that the collision was caused by the decedent. It is apparent that the witness was merely mentioning the impact, as he immediately thereafter said that the left front corner of the hay rack struck the left front of their truck, entered the cab, smashed into them and they tipped over. We do not regard the testimony as indicating that the collision was the fault of the decedent.

It is also urged that the fact that the hub cap on both rear left wheels were knocked off, while no part of appellant's truck in front of the left rear wheel was injured, demonstrates that his theory of the accident is correct. Nobody testified that the first impact was at the hubs of the rear wheels of the trucks. If the decedent's truck swerved to the right, as testified to by the witnesses for appellee, it is conceivable that the impact of the hay rack against its left front end could have thrown the rear end of the two trucks together and thus have knocked the hub cap off. Natural instinct would prompt the decedent to turn to the right in order to avoid a collision, and no reason is suggested why he would turn to the left. The jury and the trial judge saw and heard the witnesses and were in a better position than this court to judge of their credibility. We are unable to say that the verdict is against the manifest weight of the evidence or that it shows contributory negligence on the part of appellant's intestate.

When appellant was examined as an adverse witness, he testified that on the evening of the accident he drove to his brother's home eight miles from his own home and about three and one-half miles from Pecatonica, picked up the trailer and hay rack, and on the way back went to a canning company at Pecatonica. He named the men with him and told of the



might into the grass on the left, and that is the accident's end.  
Got in front of him is turned to the left very sharply.  
Appellant states that one of the witnesses, in first describing the accident, said: "The truck over to the  
hill, starting down, other vehicles coming up. He was into side of  
truck," as indicating that the collision was caused by the accident.  
It is apparent that the witness was merely following the impact, as  
he immediately thereafter said that the left truck corner of the way  
back struck the left front of their truck, entered the cab, entered  
into them and they tipped over. He does not regard the testimony as  
indicating that the collision was the fault of the accident.  
It is also urged that the fact that the cab of the truck was  
knocked off, while no part of appellant's truck is front  
of the left rear wheel was injured, demonstrated that the theory of the  
accident is correct. Nobody testified that the first impact was at the  
hubs of the rear wheels of the trucks. If the accident's truck moved  
to the right, as testified to by the witnesses for appellant, it is con-  
ceivable that the impact of the way back against the left front and could  
have thrown the rear end of the two trucks together and thus have knocked  
the cab off. Appellant would present the accident as turn  
to the right in order to avoid a collision, and he passed in response  
why he would turn to the left. The jury and the witness would  
heard the witnesses and were in a better position than this court to  
judge of their credibility. We are unable to say that the witness is  
against the admitted right of the evidence or that it shows a contrib-  
utory negligence on the part of appellant's insurance.  
When appellant was examined as an adverse witness, he testified  
that on the evening of the accident he drove to the two-story house eight  
miles from his own home and about three and one-half miles from the accident,  
poked up the trailer and way back, and on the way back sent to a con-  
ning company at Pocatello. He named the man with him and told of the

offer of one of them to stand on the hay rack with a flash light, and of his declining the offer. He described his truck, the trailer and the hay rack, identified two photographs as showing the hay rack after the accident, and testified he took it off the highway that night. On this adverse examination he was not asked about and did not testify to anything about the accident. On his re-examination by his counsel he was permitted to describe the condition of the hay rack after the accident, and that the clevis of the trailer tongue was still attached to the rear of his truck. Objections to questions as to whether his truck crossed the black center line of the pavement and whether any part of his truck was struck by the other truck, were sustained. When placed on the stand as a witness in his own behalf, the court refused to permit him to testify concerning the accident.

Appellant claims that under section 2 of the Evidence Act, (Ill. Rev. Stat. 1941, chap. 51, par. 2) the adverse examination opened up the way for his testifying as to the accident. That section, so far as applicable here, provides that no party to any civil action shall be allowed to testify therein on his own motion, or in his own behalf, when any adverse party sues or defends as the administrator of any deceased person, unless when called as a witness by such adverse party so suing or defending.

Combs v. Younge, 281 Ill. App. 339, relied upon by appellant, does not sustain his contention, but holds that such facts, concerning which the other party may testify, should be within the scope of the facts testified to by him when examined by the calling party under cross-examination, as determined by the judgment and discretion of the trial court. The holdings in Garrus v. Davis, 234 Ill. 326, and Grace v. Grace, 270 Id. 558, also cited by appellant, are likewise contrary to his contention. Under the limited scope of the adverse examination the court correctly excluded his offered testimony concerning the accident.



offer of one of them to stand in the way of the other, and  
of him declining the offer. He described the scene, the position and  
the way back, I omitted two photographs and during the way back after  
the accident, and testified as to the fact that he did not  
this day the accident occurred. He did not know the man who testified to  
anything about the accident. In his cross-examination of the witness he was  
permitted to describe the position of the man who testified to the accident,  
and that one of him of the other party was with him at the time of the  
of his friend. He testified that he was with him at the time of the  
black center line of the road and that he was at the time of the  
stroke by the other party, very positive. He placed in the stand  
a witness in his own behalf, the court refused to permit him to testify  
concerning the accident.

Appellant claims that under section 2 of the Evidence Act, (1911,  
New Stat. 1911, chap. 51, par. 2) the adverse examination opened by the  
way for his testimony as to the accident. This section, so far as ap-  
plies to him, provides that no party to any civil action shall be allowed  
to testify therein on his own motion, or in his own behalf, when any ad-  
verse party has or intends to introduce evidence of any deceased person,  
unless when called as a witness by that adverse party to bring on the  
issue.

Grove v. Grove, 221 Ill. App. 325, relied upon by appellant, does  
not contain the contention, and also does not touch upon the contention which  
the other party may testify, should he wish to bring on the issue  
testified to by him when examined by the other party under cross-examina-  
tion, as determined by the judgment and discretion of the trial court.  
The holdings in Grove v. Grove, 221 Ill. App. 325, and Grove v. Grove, 270  
Ill. 238, also cited by appellant, are likewise contrary to his contention.  
Under the limited scope of the adverse examination the court correctly  
excluded his offered testimony concerning the accident.

There was no error in permitting the doctor who performed the autopsy to describe the condition of the body, over appellant's objection, after admitting the death was caused by the accident. The testimony was competent as tending to show, by the character of the injuries, that they were caused by the hay rack, and cannot be said to be inflammatory or prejudicial to appellant.

Complaint is made of given instruction No. 3, relating to the measure of damages, which, after setting out the necessary elements to be proven, and in respect to ~~the~~ amount thereof, if any, concluded with the words: "Modified by the possibility of other contingencies, which might lessen or destroy the possibility of such benefit." The words quoted are complained of as misleading and and as giving the instruction a doubtful and conjectural meaning. ~~to avoid such result,~~  
~~and~~ ~~the~~ ~~words~~ ~~quoted~~ ~~inure~~ ~~to~~ ~~the~~ ~~benefit~~ ~~of~~ ~~appellant~~ ~~and~~ ~~he~~ ~~is~~ ~~not~~ ~~entitled~~ ~~to~~ ~~complain~~ ~~of~~ ~~them~~. The words quoted inure to the benefit of appellant and he is not entitled to complain of them. The claim that the instruction is bad because it should have confined the guilt to the evidence, is equally without merit. The instruction does not direct a verdict, and other given instructions fully informed the jury on that question.

When appellee's counsel interrogated appellant as to whether he went to a tavern in Pecatonica, objections to the questions were promptly sustained. The size of the verdict does not indicate that the jury were influenced by the asking of the questions. No authority is cited for the claim that the judgment is excessive because there was no proof of contribution, and we do not understand it to be the law that such proof is necessary.

Appellant had a fair trial, there is no reversible error shown, and the judgment of the trial court is affirmed.

Judgment affirmed.



There was no error in permitting the doctor who performed the autopsy to describe the condition of the body, even though his testimony, after making the above statement, was not subject to cross-examination, and he was not subject to cross-examination, and he cannot be said to be influenced or prejudiced by the evidence.

Complaint is made of given evidence in No. 3, relating to the measure of damages, which, after stating the necessary elements to be proven, and in respect to the amount thereof, it was, concluded with the words: "Justified by the testimony of these witnesses, which might lessen or destroy the probability of such result." The words should be completed by stating that the living and

instruction is doubtful and contradictory, resulting.

~~Complaint is made of given evidence in No. 3, relating to the~~

he is not entitled to complain of them. He is in fact the instruction

is bad because it would have confused the jury in the evidence, and

equally without merit. The instruction does not direct a verdict, and

other given instructions fully informed the jury on that question.

When appellee's counsel interrogated the witness as to whether he went

to a tavern in Jackson, objection to the question was promptly

sustained. The case of the witness does not indicate that the jury were

influenced by the asking of the question. No authority is cited for

the claim that the judgment is excessive because there was no proof of

contributions, and we do not understand it to be the law that such proof

is necessary.

A plaintiff has a fair trial, and there is no reversible error shown, and

the judgment of the trial court is affirmed.

Judgment affirmed.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

MAY TERM, A. D. 1943

Charles B. Campbell, Jr., and  
Pleasant Whipple Campbell,

Appellants,

vs.

Charles H. Albers, Receiver of the  
Citizens State Bank of Manteno, et al.,

Appellees.

Appeal from Circuit  
Court of Kankakee  
County

320 I.A. 140<sup>2</sup>

Fred H. LaRocque and Frank M. Wright,

Appellees

vs.

CONSOLIDATED CASES.

Mary Wood Campbell, individually and as  
executrix of the Last Will and Testament  
of Winfield S. Campbell, deceased, et al.,

Appellants

DOVX, J:

This cause is in this court a second time. It originated in the circuit court of Kankakee County, as a suit by appellants, who are the beneficiaries of a testamentary trust, against the trustees, the legal representatives, legatees and devisees of the deceased sureties on their bond, as the legal representatives, legatees and devisees of a deceased legatee of one of such sureties, and the receiver of the Citizens' State Bank of Manteno, for an accounting, removal of the trustees, payment of all moneys received by them, with legal interest, and the appointment of new trustees.

From a decree approving certain current reports of the trustees, ordering certain bonds and stock in a hotel company, acquired by them, to be turned over to the plaintiffs, dismissing the suit as to the legal representatives, "heirs" and devisees of the deceased sureties, exonerating the trustees and the receiver from paying any interest except that actually received, and providing for fees for the trustees



[illegible]

10-11-12

[illegible]

The above information was obtained from the records of the Bureau of Investigation.

Very truly yours,  
Special Agent in Charge

and their attorneys, there was an appeal to this court, and we reversed the decree and remanded the cause with directions to enter a decree in conformity with the views expressed in the opinion, in which the facts are set forth at length. (Campbell, et al. v. Albers, et al., 313 Ill. App. 152.) We held that the trustees were not entitled to be credited with the bonds and stock mentioned, or to any fees, and the opinion states that "the trustees, the legal representatives, legatees and devisees of the sureties on their bond, and the receiver, are liable for the full amount of the trust funds, with interest at the legal rate from the respective dates of their receipt, except that the liability for interest on the Weber and the Smith loans, (respectively 6% and 5½%), and on the Liberty Bonds, and other bonds of the United States, should be the actual amounts received in those instances."

When the remanding order was filed in the trial court, the trustees filed an itemized final report, charging themselves with all moneys received, with interest at five per cent per annum from the respective dates of receipt, with adjustments on the Weber and the Smith loans, and the bonds of the United States as specified in our holding, and showing a balance due appellants of \$16,033.94. Thereupon, appellants filed a motion for leave to amend their complaint, by inserting after the words: "plus legal interest on all funds from the dates said monies were deposited in said bank", the words: "computed with annual stops," and by adding to the last paragraph, the following: "that the court will grant such other and further relief as equity may require". The motion was denied, and the court entered a decree approving the trustees' final report, and ordering payment to appellants of the amount shown therein to be due, with interest from its date at the rate of five per cent per annum. The grounds urged for reversal are that the court erred in denying leave to amend the complaint, and in refusing to allow interest computed with annual stops, or in other words, compound interest. Appellants filed in this court a motion to dismiss the cause as





as to Otto C. Woerter, successor receiver of the bank, with a receipt for a copy thereof from the attorneys for appellees, and the motion not being resisted, is granted.

The claim that the original complaint, and our holding on the former appeal are susceptible of the construction that the interest should be computed with annual steps, is so obviously without foundation as to need no further comment. The motion for leave to amend recognizes the fact that the complaint prayed for simple interest computed in the ordinary way, and our holdings follow that claim without any ambiguity or room for a different interpretation. That holding was a final reviewable order. (*Town of Kaneville v. Meredith*, 361 Ill. 556, 563; *Mitchell v. King*, 187 id. 452, 456-457) No appeal was taken therefrom, and it is binding upon the parties, the trial court and this court. (*West v. Douglas*, 145 Ill. 164, 166; *People v. Wilitzer*, 301 id. 284, 287). Although the complaint was couched in the language quoted, appellants contended on the former appeal, and in their briefs on this appeal assert that they have always insisted they are entitled to compound interest. Where a case has been decided on appeal, and is brought up on a second appeal, the only question for consideration is whether the trial court followed the mandate of the reviewing court. It could not err if it did so, and the former appeal settles every question which was raised or could have been raised. (*Commissioners of Lincoln Park v. Schmidt*, 379 Ill. 130, 132; *Randolph v. Hinek*, 288 id. 99, 101; *Hanning v. Eldridge*, 146 id. 305, 310.)

The further claim that the calculation of the interest, even on the basis of our holding, is \$1,245.28 short of the correct amount due, is based upon an erroneous assumption of the total amount of principal received, and if the claim was entertained it would have to be denied, but it was not raised in the trial court and will not be considered.

The court did not err in denying the motion for leave to amend the complaint, the decree was in conformity with the mandate of this court, and is affirmed.

Decree affirmed.





Abstract

GEN. NO. 9877

AGENDA NO. 6

IN THE APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
MAY TERM, A.D. 1943

HAROLD KERN, WILLIAM  
L. WREN and RUTH WREN,  
APPELLEES,  
vs.  
EARL HOWARD,  
APPELLANT.

320 I.A. 141

: APPEAL FROM THE CIRCUIT  
COURT OF GRUNDY COUNTY.

PER CURIAM

This was an action by appellees against appellant for personal injuries received from a collision of an automobile in which they were riding, with the rear of appellant's truck. Trial resulted in verdicts for each of the plaintiffs, and the defendant brings this appeal.

The accident occurred on the bridge across the Illinois river, at Morris. The evidence on the part of plaintiffs is to the effect that appellant's truck was stopped on the bridge near the crest or apex thereof; that no lights were in operation upon the rear of the



10-10-1934

U. S. DEPARTMENT OF JUSTICE

NEW YORK, N. Y.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

DOCTRINE

JOHN J. WATSON, JR.,

10-10-1934

JOHN J. WATSON, JR.,

JOHN J. WATSON, JR.,

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JOHN J. WATSON, JR.,

JOHN J. WATSON, JR.,

JOHN J. WATSON, JR.,

JOHN J. WATSON, JR.,

This was an action by appellee against appellant for personal injuries received from a collision on an automobile in which they were involved, also the use of appellant's truck. Trial resulted in verdict for appellant, and the defendant claims that appeal. The accident occurred on the bridge across the Illinois river, at Chicago. The evidence on the part of plaintiff is to the effect that appellant's truck was stopped on the bridge near the west end thereof; that no lights were in operation from the rear of the

truck, and no flare, signal light, or other warning, placed to the rear; and that because of the failure in this regard, appellees had no notice or warning of the position of the truck on the highway until too late to avoid a collision.

Appellant urges the evidence fails to show the exercise of due care on the part of appellees. This was a question in the first instance, for determination of a jury, and it appears to have been fairly and properly submitted. They have found the issues in this regard against appellant. We are of the opinion the evidence was sufficient to support such finding, if the jury saw fit to accept it.

Appellant also urges that his negligence, if any, was merely a condition, and not the proximate cause of the occurrence, urging in this respect the doctrine as announced in *Briske v. Village of Burnham*, 379 Ill. 193. That case involved a collision with a barricade across a vacated street. Furthermore, the barricade was a lawful obstruction, while to permit a stalled motor truck, to remain unlighted, at night, upon the highway, without taking the precautions provided by statute, is negligence.

Appellant's contention that the verdicts are against the weight of the evidence is met by his first objection as to the question of negligence and contributory negligence. We are of the opinion the record contains sufficient evidence to support a verdict for appellees, in the event the jury accepted same.



truck, and no flare, signal light, or other warning  
placed on the road; and that because of the darkness  
in this regard, applicant had no choice but to take  
the position of the front of the highway, and to take  
it as a collision.

Applicant argues the evidence fails to show the  
existence of due care on the part of respondent. This  
was a question in the first instance, for determination  
of a jury, and it appears to have been fairly and properly  
submitted. They have found the issues in this regard  
against applicant. We are of the opinion the evidence  
was sufficient to support such finding, in the jury's  
view to accept it.

Appellant also argues that his negligence, if any,  
was merely a condition, and not the proximate cause of  
the occurrence, arguing in this respect the doctrine as  
announced in *Wicks v. Village of Geneva*, 279 Ill. 193.  
That case involved a collision with a horse-drawn wagon  
on a street. Furthermore, the defendant was a law-  
ful operator, while to permit a loaded wagon to  
travel unlighted, at night, upon the highway, without  
taking the precautions provided by statute, is negligence.  
Appellant's contention that the verdict was against  
the weight of the evidence is set by his first objection  
as to the creation of negligence and contributory negligence.  
He is of the opinion the record contains sufficient evi-  
dence to support a verdict for applicant, in the event  
the jury accepted same.

Shortly after the accident, the driver of appellant's truck stated that he had run out of gasoline, and to another witness, that the truck had stopped and he was trying to get it started. It appears he was in the cab at the time of the collision. Appellant urges the admission of this evidence as error on the ground that it was no part of the res gestae. However, these statements had nothing to do with how the accident happened, nor were they in any way connected with the question of negligence or contributory negligence. There is no question but that the truck was there, and the collision occurred. We do not consider such statements to constitute error.

Appellant objects to his refused instruction # 1, his modified instruction #10, and plaintiff's instruction # 8. With respect to appellant's refused instruction # 1, it may be said that an instruction can embody correct rules of law, but not be a proper instruction under the evidence in the case. We are not of the opinion the jury was in any way confused or misled by appellant's instruction #10, as modified by the court, or plaintiff's instruction # 8.

It is further urged by appellant that appellees' attorney made improper statements before the jury, which raised the presumption that someone other than appellant was interested in the outcome of the suit -- thus seeking to inject the question of insurance into the case. We do not find the record quite sustains this objection.



At this time the court was divided 4-4, with Chief Justice Warren and Justices Black, Douglas, and Brennan in the majority, and Justices Clark, Harlan, and White in the minority. The majority opinion was written by Chief Justice Warren, and the dissenting opinion was written by Justice Clark. The majority opinion held that the government's action was unconstitutional, while the dissenting opinion held that it was constitutional. The case was eventually decided by the Supreme Court in a 5-4 decision, with the majority opinion written by Chief Justice Warren and the dissenting opinion written by Justice Clark.

The case would appear to be one primarily based upon the points first raised by appellant in his assignment of errors and receiving the most space in his argument, that is, a question of negligence.

This is one of those instances where the result of the litigation necessarily must be based upon the testimony of one side to the exclusion or rejection of that of the other. There is no middle ground. This rule both as to cases at law and equity, is well illustrated in the cases of *Shevalier v. Seager*, 121 Ill. 564, 568; and *Carney v. Sheedy*, 295 Ill. 78, 83; and cases there cited.

It is the province of the jury in the first instance, to determine disputed questions of fact. After a careful review of the record, we do not feel disposed to disturb the judgments.

Judgments affirmed.



The case would appear to be one of the many  
upon the police force by reference to the  
test of errors and revealing the facts in the  
case, that is, a question of law.

The fact of the case is that the  
of the evidence necessarily must be based upon the  
testimony of one side. The exclusion of the  
of fact of the case. There is no other ground  
this order to assess the law and equity, as well as  
test to the case of *Traveler v. Bagley*, 181 Ill. 506,  
507; and *Curry v. Smith*, 205 Ill. 57, 58; and *Smith*

these cases.  
It is the purpose of the law in the first instance  
to determine the disputed questions of fact. After a  
full review of the record, we do not feel disposed to  
disturb the judgment.

Reversed and remanded.

320 2d. App  
adv. 64 2  
9-1-43

320 I.A. 1. 81

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
May Term, A. D. 1943

Term No. 43M7

Agenda No. 10

HENRY MELTON, Administrator of  
the Estate of Fred James Melton,  
deceased,  
  
Plaintiff-Appellee,  
  
vs.  
  
JOHN HEATON and CHARLES DOOLEY,  
  
Defendant-Appellant.

Appeal from the  
Circuit Court of  
Randolph County

STONE, J.

Henry Melton, Administrator of the Estate of Fred James Melton, deceased, appellee (hereinafter designated as plaintiff) brought suit in the Circuit Court of Randolph County to recover damages, for the death of plaintiff's intestate, resulting from an alleged collision on June 9th, 1941, between the bicycle being ridden by plaintiff's intestate and the truck of John Heaton, appellant, being operated by Charles Dooley, appellant (both hereinafter designated as defendants). It was alleged by plaintiff that the truck driven by defendant Dooley passed deceased while going in the same direction, on a state hard surfaced road, near Coulterville, Illinois, and that in passing the defendants so negligently operated the truck, that it struck the bicycle on which deceased was riding, causing injuries which later resulted in his death.

Fred James Melton, at the time of his death was 31 years of age. Deceased was deaf and dumb but had apparently no other physical disabilities and an alert mind, and was employed at the





time of the accident on a W. P. A. project at Coulterville. He lived in Tilden with his mother, aged 61, and two brothers, aged 18 and 15. His mother had no income separate from his earnings and from April 4, 1941, when he commenced working on the W. P. A., he paid the living expenses of the family group.

At the time of the accident, approximately 5:40 A. M. plaintiff's intestate was riding his bicycle in an easterly direction on a hard surfaced road about two and one half miles west of Coulterville, on his way to work, as had been his custom. On the evening of June 8th, defendants drove the Heaton truck from West Frankfort to St. Louis, to the fruit and vegetable market. After Securing a load, they left St. Louis about 4 o'clock the following morning. On the road between Tilden to Coulterville, Heaton was asleep, and Dooley was driving the truck in an easterly direction at about 30 or 35 miles an hour. Plaintiff's intestate was riding his bicycle ahead of the truck going in the same direction and was about two feet from the south edge of the slab. When Dooley got up close to the bicycle he started to go around it. He claims that he drove the truck so that it was astraddle of the black line. After the front end of the truck passed plaintiff's intestate, Dooley says that he heard a popping noise. He drove ahead and onto the shoulder and stopped. The stopping of the truck awakened Heaton and they went back and found plaintiff's intestate lying on the ground, off the slab, bleeding on the side of his face, and unconscious. His bicycle was lying along side of him, also off the slab. He was taken to Coulterville, where he died. It was stipulated that deceased died of head injuries sustained.

The case was tried by jury, on amended complaint and answer, and the jury found for plaintiff in the sum of \$3650.00 and this appeal is prosecuted from the judgment entered upon that verdict. It is alleged as error relied upon for reversal, that the trial court erred in refusing to direct a verdict for defendants at





the close of plaintiff's evidence, and again at the close of all the evidence; that the court erred in giving certain instructions in regard to damages, and that the verdict of the jury was not based upon the evidence, but was the result of passion and prejudice.

It is contended on behalf of defendants, that there was only one person, defendant Dooley, who could throw any light on the death of plaintiff's intestate, and that there was no evidence offered by him or by any other witness to show that death was due to the actual negligence of defendants. It is the theory of defendants that the accident was caused by deceased grabbing hold of a chain which hung suspended from the rear of the Heaton truck, and in furtherance of that theory, offered the evidence of the witness Lesley Standard, former captain of the Illinois State Police who testified that he examined the truck and that there were some finger marks around where the chain hooks up on the side, but that he did not take prints of the finger marks. Defendants claim that the jury could not possibly have arrived at their verdict without speculation and conjecture. We are of the opinion, that the jury would have been venturing far into the field of speculation and conjecture, to have believed that plaintiff's intestate was killed by his grabbing hold of this chain. Defendant, John Heaton, who was the owner of the truck testified that at St. Louis he hired a colored man to load the truck. The jury could very well believe that these unidentified finger prints on the truck were placed there at the time that the truck was loaded in St. Louis, in the absence in this record of any evidence to the effect that plaintiff's intestate, grabbed or attempted to grab the chain on the back of the truck.

The jury could very well, and probably did take into consideration the testimony of defendant Dooley to the effect that they had left West Frankfort at eight o'clock on the evening of June 8th; that he had only two hours sleep, lying down in the truck.





Then follows his description of his fight to stay awake, "I washed my face, because I was sleepy -- I drank a coke -- I had a cup of coffee to keep from going to sleep -- I stopped at Freeburg and got some more coffee -- I stopped two or three times in all. I wanted coffee -- I wasn't sleepy exactly, but I wanted coffee to keep from going to sleep--. I am pretty sure we stopped at Tilden, I got a cup of coffee". These were matters that the jury had a right to take into consideration in determining the alertness of the driver of the truck at the time he passed the plaintiff's intestate on his bicycle.

The record shows that the bicycle, when found, had the left handle bar completely broken off; that the rear fender had a dent below the luggage carrier; that the luggage carrier was bent up toward the seat, and that the seat was turned sideways and there was a mark across one side of it, "like something had cut a straight mark across one corner of it". Plaintiff, who was a brother of deceased testified that when he arrived at the scene of the accident there was a small spot of blood about eight feet from the edge of the pavement on the south side, and that there was a place at the edge of the pavement where it looked like something had slid toward the blood spot. Defendant Dooley admitted that he testified at the inquest, "I might have sideswiped him, or he might have grabbed the chain."

While the witness Standard testified by way of conclusion that the examination he made of the truck did not disclose that it had been involved in an accident, and had no marks on it, the jury would have a right to consider that it would not require much impact between a truck loaded with oranges, lemons, apples, grapefruit, watermelons and cantaloupes, driven at thirty or thirty-five miles an hour, and a bicycle which is kept on the road by virtue of the rider maintaining his equilibrium thereon, to have caused the damage to the bicycle shown in the record, and still perhaps no tangible





evidence of such impact be shown upon the truck.

What is the proximate cause of an injury is ordinarily a question of fact to be determined by the jury from a consideration of all the attending circumstances. *Waschow vs. Kelly Coal Co.* 245 Ill. 516; *Illinois Central Railroad Co. vs. Siler* 229 id. 390; *Pullman Palace Car Co. vs. Laack* 143 id. 242; *Martin vs. Village of Patoka*, 305 Ill. App. 51. There was no eye-witness to the accident, but the manner of death may be proved by circumstantial evidence. *Economy Light and Power Co. vs. Sheridan*, 200 Ill. 439; *Commonwealth Electric Co. vs. Rose*, 214 id. 545; *Waschow vs. Kelly Coal Co. supra*. From the facts and circumstances proven it could fairly and reasonably be inferred by the jury that the accident was caused as alleged in the amended complaint. It is not the province of the appellate court to substitute its judgment for that of the triers of fact where there is a conflict of fact. *Martin vs. Village of Patoka, supra*. We are therefore constrained to hold that the trial court did not err in refusing to direct a verdict at the close of plaintiff's testimony and again at the close of all the evidence.

It is also alleged as error, that the trial court erred in giving an instruction requested by plaintiff, which told the jury, " \*\*\* In such case it is not necessary that any witness should have expressed an opinion as to the amount of damage, if any, \*\*\*". This instruction pertained only to damages, and as stated above it is not assigned as error or argued that the damages awarded were excessive. It has been repeatedly held that evidence or instructions going to the measure of damages where the amount is not questioned as excessive, will not work a reversal, because errors therein, if any, are harmless. *Reisch vs. People* 130 Ill. App. 164, *aff'd.* 229 Ill. 574; *Semrau vs. Calumet & S. C. Ry. Co.* 185 Ill. App. 203; *Hutchinson vs. Chicago City Ry. Co.* 192 id. 464. *Garner vs. Ry. Express Co.* 274 id. 626. We do not





find it necessary therefore to discuss the above errors relied upon for reversal.

Neither the size of the verdict, nor any of the testimony lead us to believe that the verdict was the result of passion and prejudice on the part of the jury. Finding no reversible error in the record, the judgment of the trial court will be affirmed.

AFFIRMED.

**FILED**  
JUL 10 1943

*Mamie H. Mallett*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

**Abstract**





STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT

October Term, A. D. 1943.

Term No. 43M14

Agenda No. 6

MYRTLE CURRIE,

Plaintiff-Appellee,

vs.

A. F. CURRIE,

Defendant-Appellant.

Appeal from the  
Circuit Court of  
Madison County.

CULBERTSON, P. J.

This is an appeal from a decree of the Circuit Court of Madison County, by the terms of which MYRTLE CURRIE, Plaintiff-Appellee (hereinafter called plaintiff) was awarded a decree for divorce, alimony of \$40.00 per month, and attorney fees in the sum of \$150.00, against A. F. CURRIE, Defendant-Appellant (hereinafter called defendant).

It appears that the original complaint filed in this cause on April 1, 1941, was a complaint for separate maintenance, and later the complaint was amended in the prayer thereof and the divorce, alimony and attorney fees were prayed for. The complaint in this case was verified, and to same was filed a verified answer. The verified answer of the defendant contains, with other language, the following: "Admits that on the 14th day of October, 1939, plaintiff and defendant were lawfully joined in marriage and thereafter maintained conjugal relations, until the 5th day of February, 1941." On June 26, 1941, defendant filed an amendment to his answer wherein he sought to deny the legality of the marriage that he previously had stated, under





oath, was legal.

On June 27, 1941, evidence on part of both the plaintiff and the defendant was heard, and at the close of the cross examination of the defendant the Court asked, "Mr. Currie, you are married to her, aren't you?" and to which query by the Court the defendant herein answered, "Yes, sir." Whereupon, the Court then said to Mr. Currie, "What does this mean, the amendment denying the marriage?" Whereupon, counsel for the defendant answered and said, "There is a question there about this sworn testimony in January, 1940, where she testified at the time of the accident on May 6, 1940 he was her husband. That was the purpose of it." The Court then said to Mr. Schuman, "You don't make any issue of that now, do you?", to which Mr. Schuman replied, "That was the only reason at that time, that testimony. I understand that they were married at Henderson, Kentucky in October, 1940. That is the only purpose of it." The Court then made the very pertinent observation to plaintiff and defendant that "they were old enough to know their own minds and that they were making a mistake litigating, and that if they couldn't live together they ought to be divorced, and that if they could live together they should be doing so, rather than being in Court." After this conversation between the Court, the attorneys, and litigants, counsel for defendant stated that if something could be worked out along the lines of a reconciliation, that he would prefer not to put on more testimony at that time, to which the Court agreed, and the cause was continued. The efforts for reconciliation appear to have failed and the remaining testimony in connection with this case was heard by the Court on January 28, 1942.

On March 20, 1942 it appears that leave was given plaintiff to amend her complaint by changing the prayer thereof and asking for divorce, instead of separate maintenance. No objection appears to have been made to the amendment of the





complaint being made, or the filing of the amendment pursuant to the leave granted, and it may be fairly inferred from the Record that counsel for defendant knew of it. On September 30, 1942, after the amendment to the complaint had been made on March 20, 1942, and all the evidence had been heard by the Court, and the matter taken under advisement, defendant appeared in Court and asked leave to withdraw his answer and to file a motion to dismiss the case upon the alleged illegality of the divorce obtained by the plaintiff from her former husband. Plaintiff herein filed a motion asking that the motion of the defendant to withdraw his answer and for leave to file a motion to dismiss be denied and stricken from the files, and an answer was filed thereto on November 25, 1942. The Court denied defendant's motion to withdraw his answer and for leave to file a motion to dismiss.

It is urged on this appeal that the Court committed reversible error in denying defendant the right to withdraw his verified answer hereinbefore referred to. We have examined the motion and affidavits presented in connection therewith (said affidavits being filed by leave of Court after the decree had been signed), and certain counter-affidavits filed in opposition to the allowance of the motion, and from an examination of all of these, and giving proper consideration to the orderly dispatch of business in the Courts, we cannot but conclude that the eminent Chancellor who heard this matter (in a very thorough and painstaking manner, as the Record discloses) was and properly should have been vested with a very wide discretion in this matter, and we cannot say that he acted in any way arbitrarily or unreasonably, but, on the contrary, we believe his determination of the matter was right and just and proper.

A further point is made that the Chancellor committed reversible error in not ruling the defendant to plead to the





complaint as amended. The record discloses that there was nothing questionable done in this case, that everything was open and known to counsel for both plaintiff and defendant, and we must hold that counsel for the defendant, after having participated in this matter at various times before the Court at and after the time the complaint was amended, has waived any right to now complain and assign as reversible error the failure of the Court to enter a rule on the defendant to plead to the complaint as amended.

It is further insisted on this appeal that the Court committed error in granting a divorce as the evidence was insufficient to constitute grounds for divorce. We have examined the record in this case with great care and the evidence that was produced in support of the charge of extreme and repeated cruelty, we believe, meets every requirement that would warrant a decree. It could serve no useful purpose in this opinion to undertake a recital of the various acts of cruelty proven in this case. Cruelty, under the Divorce Act, means to be subjected to physical abuse, and although the defendant denies the acts of cruelty testified to by the complainant and two other witnesses, the Chancellor's finding in awarding a divorce on that ground will not be disturbed on review, unless it is against the manifest weight of the evidence (BERLINGIERI vs. BERLINGIERI, 372 Ill. 60). This case was heard before a Chancellor, and we believe that the Chancellor's finding, as same is reflected in the decree, is not only not against the manifest weight of the evidence, but that same is abundantly supported thereby.

Various other assignments of error are made, all of which have had our careful consideration, and we must conclude that there is no reversible error in this Record, and the decree appealed from is, therefore, affirmed.

Abstract

Affirmed.

**FILED**

JUL 20 1943

*Mamie H. Mallett*  
CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS





42187

HELENA REICHWEIN, as Trustee under the  
Last Will and Testament of Christina  
Reichwein, Deceased,

Appellant,

v.

JULIA R. MCCARTHY (Robert E. Gunterberg,  
Amy Gunterberg, his wife, Lawndale National  
Bank as Trustee under Trust No. 1003), etc.,

Appellees.

320 I.A. 238<sup>1</sup>

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a foreclosure proceeding commenced by plaintiff upon one of two mortgage notes. Defendants counterclaimed in foreclosure on the other note. The final decree ordered foreclosure and sale upon the cross-complaint with priority in favor of cross-plaintiff, and plaintiff appeals.

Julia R. McCarthy executed Note A for \$500.00 and Note B for \$2,500.00 due October 18, 1930 and 1932, respectively, payable at the office of John A. Schmidt & Co., Chicago. She conveyed real estate in trust as security. Schmidt & Co. sold the notes to Robert Gunterberg, who at maturity sent note A to the Company for collection. Shortly thereafter the Company mailed its check to Gunterberg for interest and subsequently a check for the principal sum. It appears that the Company did not receive payment on that note from the maker, but had advanced the sums and entered into an extension agreement with the maker under which the maturity date of the note was extended one year, during which the maker was to pay monthly \$50.00 on account of the indebtedness. About October 29, 1932, plaintiff received the note in settlement of her accounts with the Estate of John A. Schmidt, one of the partners of the Company. Plaintiff filed her suit on default in payment of Note A and taxes and declared the entire indebtedness, under the Trust Deed, due. Gunterberg had no notice of default in the note until suit was filed, for they assumed it had been paid and canceled.

HELEN REICHWEIN, as Trustee under the  
Last Will and Testament of Christian  
Reichwein, Deceased,  
Appellant,

JULIA P. McGEATHY (Robert P. Gunterberg,  
Amy Gunterberg, his wife, Lawdale National  
Bank as Trustee under Trust No. 1003), etc.,  
Appellees.

CIRCUIT COURT,  
COOK COUNTY,

MR. JUSTICE KILLY DELIVERED THE OPINION OF THE COURT.

This is a foreclosure proceeding commenced by plaintiff upon one of two mortgage notes. Defendants counterclaimed in foreclosure on the other note. The final decree ordered foreclosure and sale upon the cross-complaint with priority in favor of cross-plaintiff, and plaintiff appeals.

Julia P. McGeathy executed Note A for \$500.00 and Note B for \$2,500.00 due October 18, 1930 and 1932, respectively, payable at the office of John A. Schmidt & Co., Chicago. She conveyed real estate in trust as security. Schmidt & Co. sold the notes to Robert Gunterberg, who at maturity sent note A to the Company for collection. Shortly thereafter the Company mailed its check to Gunterberg for interest and subsequently a check for the principal sum. It appears that the Company did not receive payment on that note from the maker, but had advanced the sums and entered into an extension agreement with the maker under which the maturity date of the note was extended one year, during which the maker was to pay monthly \$50.00 on account of the indebtedness. About October 29, 1932, plaintiff received the note in settlement of her accounts with the Estate of John A. Schmidt, one of the partners of the Company. Plaintiff filed her suit on default in payment of Note A and takes and declares the entire indebtedness, under the Trust Deed, due. Gunterberg had no notice of default in the note until suit was filed, for they assumed it had been paid and canceled.



Gunterberg and wife in their answer deny plaintiff's ownership of Note A; that it was unpaid and outstanding; and plaintiff's right to declare Note B due. Their counterclaim prayed for foreclosure. Robert Gunterberg's amended answer asserts that Note A was extinguished and that plaintiff was a holder after maturity, by virtue of the settlement of her accounts, and after the note was extinguished. A special reference was ordered to determine whether Note A was paid and extinguished, subordinated or canceled, and to determine plaintiff's rights. The master found Note A was subordinated to B but that plaintiff had a right to institute the proceedings. The chancellor overruled objections of both parties and entered a decree according to the master's recommendations. Plaintiff appealed and this court (Reichwein v. McCarthy, 300 Ill. App. 237), dismissed the appeal on the ground that the decree was not final and not appealable. The cause was thereafter referred to a master for final hearing and, after successive references, upon his recommendation the court entered a foreclosure decree finding that Note B with its interest, costs, fees, etc., had priority over Note A and ordered the sale of the premises.

The vital issue is whether Note A had been paid and extinguished before plaintiff acquired it.

Plaintiff and John Schmidt were co-trustees of the Christina Reichwein Estate. Note A was received by her from the surviving partner of the Company in part payment of Schmidt's debts, arising out of the Reichwein Estate, approximating \$67,000. At the time she received Note A, the extension agreement was attached. She says she did not know the note had then matured and did not examine it or the extension agreement to determine the maturity.

Interest was paid Gunterberg October 20, 1930, having been received by the Company from the maker. Interest was also paid for the next period ending April 18, 1931, and \$87.50 was remitted to Gunterberg on Note B and \$17.50 retained by Schmidt & Co. on Note A. The extension agreement bears the signature of Schmidt & Co., agent.



Guntenberg and wife in their answer deny plaintiff's ownership of Note A; that it was unpaid and outstanding; and plaintiff's right to declare Note B due. Their counterclaim prayed for foreclosure. Robert Guntenberg's amended answer asserts that Note A was extinguished and that plaintiff was a holder after maturity, by virtue of the settlement of her accounts, and after the note was extinguished. A special reference was ordered to determine whether Note A was paid and extinguished, subordinated or canceled, and to determine plaintiff's rights. The master found Note A was subordinated to B but that plaintiff had a right to institute the proceedings. The chancellor overruled objections of both parties and entered a decree according to the master's recommendations. Plaintiff appealed and this court (Reichwein v. McGarthy, 300 Ill. App. 327), dismissed the appeal on the ground that the decree was not final and not appealable. The cause was thereafter referred to a master for final hearing and, after successive references, upon his recommendation the court entered a foreclosure decree finding that Note B with its interest, costs, fees, etc., had priority over Note A and ordered the sale of the premises. The vital issue is whether Note A had been paid and extinguished before plaintiff acquired it. Plaintiff and John Schmidt were co-trustees of the Christina Reichwein Estate. Note A was received by her from the surviving partner of the company in part payment of Schmidt's debts arising out of the Reichwein Estate, approximately \$87,000. At the time she received Note A, the extension agreement was attached. She says she did not know the note had then matured and did not examine it or the extension agreement to determine the maturity. Interest was paid Guntenberg October 30, 1930, having been received by the company from the maker. Interest was also paid for the next period ending April 18, 1931, and \$37.50 was remitted to Guntenberg on Note B and \$17.50 retained by Schmidt & Co. on Note A. The extension agreement bears the signature of Schmidt & Co., agent.

It is clear under the facts here that Schmidt & Co. received the note for collection, and not as purchasers, for Gunterberg said he sent the note for collection and there was no counter-testimony; that there was no agreement between the maker and Schmidt & Co. to advance the money since there is nothing in the extension agreement, signed by the Company as agent, to justify the inference; and furthermore it could only have been Gunterberg's agent and the transaction contradicts its authority for any such agreement, nor could any such agreement here defeat Gunterberg's rights. The Company had no authority to advance the money, and, accordingly, was a mere volunteer and because of its advance the note was paid and extinguished. Bennett v. Chandler, 199 Ill. 97. Plaintiff has no greater right than the Company. Plaintiff seeks to distinguish the Bennett case on the ground that there the notes were not "bearer" notes, while here the Note A is "bearer" and title passed by delivery; that in that case the notes were stamped for collection only, while here there was no such stamp; that there the notes were presented after maturity and here 11 months prior to maturity; and there the suit was by the house of issue and here by an innocent purchaser for value. Gunterberg's testimony refutes any possibility that title passed by delivery; his uncontradicted testimony that the note was mailed for collection is as effective as the stamp in the Bennett case; Gunterberg was not bound by the extension agreement and he presented Note A at maturity; and since the note was sent for collection, the Company advancing the money paid the note and it was extinguished and plaintiff cannot be an innocent purchaser thereof for value.

In her reply brief it appears that plaintiff stands on the ground that Schmidt bought the note, not paid it, and that he was a holder in due course; that plaintiff obtained the note from him in due course and is a bona fide holder and owner. The only evidence upon the transaction is the testimony of Gunterberg who denies a sale and



It is clear under the facts here that Schmidt & Co. received the note for collection, and not as purchasers, for Guntenberg said he sent the note for collection and there was no counter-testimony; that there was no agreement between the maker and Schmidt & Co. to advance the money since there is nothing in the extension agreement, signed by the company as agent, to justify the inference; and furthermore it could only have been Guntenberg's agent and the transaction contradicted its authority for any such agreement, nor could any such agreement have defeated Guntenberg's rights. The company had no authority to advance the money, and, accordingly, was a mere volunteer and because of its advance the note was paid and extinguished. Bennett v. Chandler, 133 Ill. 97. Plaintiff has no greater right than the company. Plaintiff seeks to distinguish the Bennett case on the ground that there the notes were not "bearer" notes, while here the Note A is "bearer" and title passed by delivery; that in that case the notes were stamped for collection only, while here there was no such stamp; that there the notes were presented after maturity and here 11 months prior to maturity; and there the suit was by the house of issue and here by an innocent purchaser for value. Guntenberg's testimony relates any possibility that title passed by delivery; his uncontradicted testimony that the note was mailed for collection is as effective as the stamp in the Bennett case; Guntenberg was not bound by the extension agreement and he presented Note A at maturity; and since the note was sent for collection, the company advancing the money paid the note and it was extinguished and plaintiff cannot be an innocent purchaser thereof for value.

In her reply brief it appears that plaintiff stands on the ground that Schmidt bought the note, not paid it, and that he was a holder in due course; that plaintiff obtained the note from him in due course and is a bona fide holder and owner. The only evidence upon the transaction is the testimony of Guntenberg who denies a sale and



4 *whose testimony shows*

says the Company was his agent for collection. The only finding and order justified is that there was no sale and that Schmidt did not purchase, but paid the note; that, paying it as he did without authority he was a mere volunteer, and the Bennett case applies. The extension agreement cannot help Schmidt's position and plaintiff has no greater right.

Plaintiff says that undoubtedly Gunterberg presented Note A to Schmidt and requested payment; that the maker could not pay; that the note was extended and, Schmidt & Co. to accommodate Gunterberg, purchased the extended note. The cases of Howard v. Burns, 279 Ill. 256 and Reliance State Bank v. Zisook, 222 Ill. App. 610, and the argument advanced by plaintiff to resist Gunterberg's contention that the Company was a mere volunteer, are not applicable to the factual situation here and the only testimony in the record is that the transaction between the Company and defendant was not a sale.

Plaintiff admits the Bennett case is good law, but claims it is not applicable here because the facts are not the same and that Note A was a negotiable instrument, subject to the Negotiable Instruments Law. Again we refer to the undisputed evidence proving that the instrument was not negotiated. It was sent to the Company for collection. She further contends that in the case of negotiable instruments endorsed in blank, titles pass from hand to hand without the necessity of formal attributes of a sale. This contention disregards the evidence of Gunterberg's intention. Plaintiff does not stand on subrogation, but on a sale. Since there is no evidence contradicting Gunterberg, we hold as a matter of law that there was no sale. The note, therefore, was paid by the Company as a mere volunteer and when paid was extinguished and, plaintiff having no greater right than the Company in the note, had no right to institute the suit and her complaint should be dismissed. We need consider no other points raised.

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purchase, but paid the note; that, saying it as he did without authority

order justified in that there was no sale and that Schmidt did not

says the Company was his agent for collection. The only finding and

The decree is reversed and the cause is remanded with directions to enter a decree consistent with the views expressed herein.

DECREE REVERSED AND CAUSE REMANDED WITH  
DIRECTIONS.

Burke, P.J. AND HEBEL, J. CONCUR.



The decree is reversed and the cause is remanded with  
directions to enter a decree consistent with the laws expressed  
herein.

DECREE REVERSED AND CAUSE REMANDED WITH  
DIRECTIONS.

WYKE, P.J. AND HERB, J. CONCUR.

AS  
b/4

320 A 238

Abstract

320 I.A. 238

Gen. No. 9872.

Agenda No. 4.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
MAY TERM, A. D. 1943.

JOHN M. TABOR,  
Plaintiff-Appellee,

vs.

JOLIET DOCK COMPANY, an Illinois  
Corporation,  
Defendant-Appellant.

Appeal from  
Circuit Court,  
Will County.

803  
453

WOLFE, -- J.

John M. Tabor started suit against the Joliet Dock Company in the Circuit Court of Will County to recover damage to an automobile resulting from a collision between a truck owned by the appellant and operated by their agent, and the automobile of the plaintiff, Tabor. The collision occurred in a public street of the City of Joliet, Illinois. The case was tried by a jury of six, who rendered a verdict in favor of the plaintiff, Tabor, in the sum of \$220.97, for which judgment was entered.

300 14 188

Gen. No. 11111

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT  
NEW YORK, N. Y. 1913.

Appeal from  
District Court,  
New York.

JOHN M. TAYLOR,  
Plaintiff-Appellee,  
vs.  
JOLLY BOOM COMPANY, an Illinois  
Corporation,  
Defendant-Appellant.

WOLFE, J.

JOHN M. TAYLOR started suit against the Jolly Boom Company in the District Court of New York to recover damages for an alleged collision resulting from a collision between a barge owned by the plaintiff and operated by their agent, and the steamer of the defendant, Taylor. The collision occurred in a public street of the City of Joliet, Illinois. The case was tried by a jury of six, who rendered a verdict in favor of the plaintiff, Taylor, in the sum of \$250.00, for which judgment was entered.



2.

The defendant entered a motion for judgment notwithstanding the verdict, and in lieu thereof, he tendered a motion for a new trial. Both motions were overruled by the Court, and it is from the judgment rendered in favor of the plaintiff, that the Joliet Dock Company has prosecuted this appeal.

The appellant alleges that the trial court erred in not granting their motion for a judgment notwithstanding the verdict; also in not granting the motion for a new trial, because the evidence was insufficient to sustain a verdict in favor of the plaintiff. The evidence of the defendant's negligence is not as clear and convincing, as it is in many cases, but the case was submitted to a jury for its consideration, and a verdict was rendered in favor of the plaintiff. We cannot say that this finding is against the manifest weight of the evidence.

The other error complained of, is that the Court refused to give one of the defendant's tendered instructions. The first part of the refused instruction is as follows: "The Court instructs the jury as a matter of law that if you believe that the defendant, by their agent and servant, was operating its truck at and just before the time the collision between the truck of the defendant's and the automobile of the plaintiff in a lawful manner, and that the accident would not have occurred except for

The defendant's motion for judgment notwithstanding the verdict, and in law directed, be dismissed, and it is so ordered. Both motions were overruled by the Court, and it is the judgment rendered in favor of the plaintiff, and the Dock Company has prosecuted this appeal.

The appellant alleges that the trial court erred in not granting their motion for a judgment notwithstanding the verdict; also in not granting the motion for a new trial, because the evidence was insufficient to sustain a verdict in favor of the plaintiff. The evidence of the defendant's negligence is not so clear and convincing, as it is in many cases, but the case was submitted to a jury for its consideration, and a verdict was rendered in favor of the plaintiff. We cannot say that this finding is against the weight of the evidence.

The other error complained of, is that the Court refused to give one of the defendant's reversed instructions. The first part of the refused instruction is as follows: "The Court instructs the jury as a matter of law that if you believe that the defendant, by their agent and servant, was operating the truck at and just before the time the collision between the truck of the plaintiff and the automobile of the plaintiff in a lawful manner, and that the accident would not have occurred except for

3.

the negligent act of a third person, then the jury should find the defendant, The Joliet Dock Company, not guilty even though the plaintiff, John M. Tabor himself was not guilty of any negligence. The mere happening of an accident in itself does not in any way necessarily mean that the Joliet Dock Company was guilty, and before the jury can find the Joliet Dock Company guilty, they must find that the truck in question was operated negligently and that it was the proximate cause of the accident in question." Appellant states that the same instruction was given in the case of *Lehmann vs. City of Chicago*, 261 Ill. App. 650. This is an abstract opinion, and we do not have the facts of that case before us to see why such an instruction was applicable.

The appellant has also cited several cases that hold that instructions relative to collisions being purely accidental are proper, and the defendant was entitled to have the jury so instructed, and cite *Bentkowski vs. Bryan*, 299 Ill. App. 217. No doubt this is the law, but the vice in the tendered instruction is not that part which relates to a pure accident. It does not comply with the pleadings and proof in the present case. To be applicable, it should have followed the instruction as in *Bentkowski vs. Bryan*, supra. This instruction as presented reads: "if the jury believe that the truck of the defendant was being driven in a lawful manner." There was no instruction





4.

given to the jury explaining to them what is meant by "lawful manner." If the instruction had been, that if the driver of the defendant's truck was operating it in a careful and prudent manner, or was using due care in the operation thereof, then we think the instruction would have been proper, and no doubt the trial court would have given it.

The Court did not err in refusing to give the instruction as presented. We find no reversible error in the case, and the judgment of the trial court is affirmed.

Judgment affirmed.

given to the jury explaining to them what he meant in "this manner." If the instruction had been, that if the delivery of the

defendant's money was operative in a material and certain manner, or was using this term in the operation itself, then to think the instruction would have been proper, and no words was

trial court would have given it.

The Court did not say in evidence to give the instruction as presented. We find no reversible error in the case, and the judgment of the trial court is affirmed.

Reversed and affirmed.



OK  
Bastman

Abstract

320 I.A. 239

Gen. No. 9878.

Agenda No. 7.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
MAY TERM, A. D. 1943.

ROBERT DAVIS AND WILLIAM G.  
HANDEL,  
Plaintiffs-Appellees,  
vs.  
EARL BICKELHAUPT,  
Defendant-Appellant.

Appeal from  
Circuit Court of  
Carroll County.

WOLFE,-- J.

Robert Davis and William G. Handel started suit before a Justice of the Peace in Carroll County, Illinois, against Earl Bickelhaupt, for damages in the sum of \$500.00. Summons was had upon Earl Bickelhaupt and the case was called for trial. Bickelhaupt was defaulted. The plaintiffs put in their evidence to maintain their contention, and judgment was entered in their favor for \$500.00 and costs of suit. Earl Bickelhaupt perfected an appeal to the Circuit Court of Carroll County, and the case was tried before a jury who rendered a verdict in the plaintiffs'

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Gen. No. 2277

Gen. No. 2277

IN THE

SUPREMACY COURT OF ILLINOIS

CHICAGO DISTRICT

FILE NO. 10, 1933

ROBERT DAVIS AND WILLIAM J.

PLAINTIFFS

vs.

EDWARD J. BROWN, JR.

Defendant

Robert Davis and William J. Brown, plaintiffs, against and  
a trustee of the Peace in Carroll County, Illinois, against and  
Richardson, for damages in the sum of \$500.00. Answer was filed  
upon said Richardson and his case was called for trial. Brown-  
Richardson was defaulted. The plaintiffs put in their evidence to  
maintain their contention, and judgment was entered in their  
favor for \$500.00 and costs of suit. Earl Richardson contested  
his appeal to the Circuit Court of Carroll County, and the case  
was tried before a jury who rendered a verdict in the plaintiffs'

2.

favor for \$310.00. Judgment was rendered on the verdict. It is from this judgment an appeal is prosecuted to this Court.

The suit having been started before a Justice of the Peace, there are no pleadings, and from the evidence in the case it is difficult to understand on what theory the plaintiffs were seeking to recover. An examination of the record discloses that the suit was started for the conversion or wrongful use by the defendant of the plaintiffs' truck. The judgment in the Justice Court is for damages for the use of the truck.

In the transcript filed by the Justice of the Peace is a statement of the evidence given before him, and it is there shown that proof was offered as to the rental value of the truck, and also that the plaintiffs had a party to whom they could have rented the truck if they had had it in their possession. The evidence before us, as disclosed by the abstract, clearly shows that the defendant got possession of the truck for the purpose of hauling hay, and was to pay for it at the rate of either \$4.00 or \$5.00 per day. As far as the record discloses, he used it for that purpose, and for that purpose only, for one day. It also shows that the defendant had a mortgage on this truck, but there is no contention that he took possession of it under his mortgage.



farther for \$10.00. Judgment was rendered on the verdict. It is from this judgment an appeal is prosecuted on this writ. The suit having been started before a Justice of the

Peace, there was no pleading, and from the evidence in the case it is difficult to understand on what theory the plaintiff's were seeking to recover. An examination of the record discloses that the suit was started for the conversion of wrongfully by the defendant of the plaintiff's truck. The judgment in the Justice Court is for damages for the use of the truck.

In the transcript filed by the Justice of the Peace is a statement of the evidence given before him, and it is there shown that proof was offered as to the rental value of the truck, and also that the plaintiff's had a party to whom they could have rented the truck if they had had it in their possession. The evidence before us, as disclosed by the statement, clearly shows that the defendant's representation of the truck for the purpose of hauling hay, and was to pay for it at the rate of either \$4.00 or \$5.00 per day. As far as the record discloses, he used it for that purpose, and for that purpose only, for one day. It also shows that the defendant had a mortgage on this truck, but there is no contention that he took possession of it under this mortgage.

3.

Under the evidence, as presented to the jury, we think the plaintiffs established their case, and were entitled to a verdict in their favor.

However, there is no evidence in the record upon which a judgment of the jury could be based in favor of the plaintiffs for \$310.00. As before stated, there is evidence that the defendant did use the truck one day, and if the plaintiffs are claiming damages for the unlawful use of the truck, the judgment cannot be sustained. On the other hand, if the plaintiffs are attempting to get damages for the conversion of the truck, there is absolutely no proof of the value of the truck. This Court is reluctant to reverse and remand a case for a judgment of this small amount, but there being no proof to sustain the amount of the damage, the judgment must be reversed and the case remanded.

Judgment Reversed and Remanded.

Under the evidence, as presented to the jury, we think the  
plaintiffs as a matter of fact, and were entitled to a  
verdict in their favor.

However, there is no evidence as to the amount of  
which a judgment of the jury could be based in favor of the  
plaintiffs for \$10,000. As before stated, there is evidence  
that the defendant did use the truck one day, and in the  
plaintiffs are claiming damages for the wrongful use of the  
truck, the judgment cannot be sustained. On the other hand,  
if the plaintiffs are attempting to get damages for the con-  
version of the truck, there is absolutely no proof of the  
value of the truck. This Court is reluctant to reverse and  
remand a case for a judgment of this small amount, but there  
being no proof to sustain the award of the damages, the judg-  
ment must be reversed and the case remanded.

Reversed and remanded.



Abstract

GEN. NO. 9861

AGENDA NO. 14

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

320 I.A. 371

FEBRUARY TERM, A. D. 1943.

IN THE MATTER OF THE  
ESTATE OF MERTON J.  
EMERSON, DECEASED,

Appellant

v.

ELVINA COOK,

Appellee.

APPEAL FROM

CIRCUIT COURT OF

McHENRY COUNTY.

DOVE, J.:

On October 5, 1940, appellee filed a claim of \$1062.33 in the county court of McHenry County against the estate of Merton J. Emerson, deceased. November 4, 1940, was claim day in the estate. Nothing was done with the claim at that time, and on March 24, 1941, the county court entered a judgment allowing the claim, without any notice to the executor or his attorney. On June 25, 1941, the executor filed a petition in the county court to vacate the judgment. Appellee filed a motion to strike the petition, and on a hearing the petition was stricken. An amended petition of the executor was filed on August 4, 1941, and on January 14, 1942, was likewise stricken on appellee's motion and a hearing. On February 18, 1942, by leave of court, the executor filed a second amended petition to vacate the judgment. Appellee again filed a

INDEXED

CHAS. H. HARRIS

IN THE CIRCUIT COURT OF HENRY COUNTY, MISSISSIPPI  
JANUARY TERM, A. D. 1943.

IN THE MATTER OF THE  
ESTATE OF J. L. EMERSON, DECEASED,  
Applicant  
v.  
LIVINA COOK,  
Defendant.

WILLIAM L. HARRIS  
CIRCUIT COURT OF  
HENRY COUNTY,

DOVE, J. :  
On October 5, 1942, appellee filed a claim of \$1002.33 in the county court of Henry County against the estate of J. L. Emerson, deceased. November 4, 1942, was claim day in the estate. Nothing was done with the claim at that time, and on March 24, 1941, the county court entered a judgment allowing the claim, without any notice to the executor or his attorney. On June 25, 1941, the executor filed a motion in the county court to vacate the judgment. Appellee filed a motion to strike the petition, and on a hearing the petition was withdrawn. A amended petition of the executor was filed on August 1, 1941, and on January 14, 1942, was likewise withdrawn on appellee's motion and hearing. On February 18, 1942, by leave of court, the executor filed a second amended petition to vacate the judgment. Appellee again filed

motion to strike and on a hearing the court entered an order overruling her motion, from which she appealed to the circuit court, renewing there her motion to strike. The executor thereupon filed a cross motion to strike appellee's motion. On the hearing, the circuit court overruled the cross motion, and on July 31, 1942, entered an order sustaining appellee's motion, dismissing the second amended petition, and adjudging the costs of the appeal against the estate, to be paid in due course of administration. Appellant's motion to set aside the order of July 31, 1942, was overruled, and the cause is hereon the estate's appeal.

Appellee's claim that the order striking the first amended petition was res adjudicata of all matters raised thereby and of every other matter which might have been raised and determined by it, is without merit. The doctrine has no application to the filing of an amended pleading in the same cause, where no issue has been joined; otherwise, the first pleading filed would conclude the rights of the pleader, and any attempted amendment would be ineffective and the statute permitting such amendments would be abrogated. The doctrine, so familiarly applied in cases cited by appellee, where the issues on the merits were litigated in a former proceeding, and a judgment or decree was entered, is not applicable here. The second amended petition alleged for the first time, that the claimant procured the allowance of her claim, when she knew that she had received checks from the deceased during his lifetime, in full payment of all services and claims of every nature and description that she had against him, and that such checks when so issued were in full payment to the date thereof, and that the claimant well knew that she had cashed such checks and received the funds thereof.

*Handwritten: 10-12*

The order of the circuit court have no bearing on the question of jurisdiction.

→ It is apparent that the order of the county court overruling appellee's motion to strike the second amended petition was merely interlocutory, leaving appellee where she could answer the petition, and did not determine any of the rights of the contesting parties on the merits. An order or decree is final and appealable only where it terminates the litigation between the parties on the merits so that when it is affirmed the court below has only to proceed with its



motion to strike was entered in order  
overriding her motion, now filed in the circuit  
court, requesting that her motion to strike be  
upon filed a motion to strike the motion. On the  
hearing, the circuit court overruled the motion and on  
July 31, 1943, entered an order sustaining appellee's motion,  
dissolving the second amended petition, and adjusting the costs  
of the appeal against the estate, to be paid in due course of  
administration. Appellant's motion to set aside the order of  
July 31, 1943, was overruled, and the cause is hereby set aside  
appeal.

The grounds urged for reversal are that the circuit court  
without jurisdiction to hear, pass upon or enter any order in the  
appeal, for the reason that the order of the county court was not  
in the order; and, in the alternative, that if the circuit  
court had jurisdiction, it erred in overruling appellant's motion  
motion to strike the motion of appellee. The jurisdictional ques-  
tion was not raised in the circuit court, and appellee contends that  
appellant cannot now shift its ground and urge any point not raised  
in that court. Seventeen other grounds urged by appellee to sustain  
the order of the circuit court have no bearing on the question of  
jurisdiction.

It is apparent that the order of the county court overruling  
appellee's motion to strike the second amended petition was merely  
interlocutory, leaving appellee free to could answer the petition,  
and did not determine any of the rights of the contesting parties on  
the merits. An order or decree is final and appealable only when it  
terminates the litigation between the parties on the merits so that  
when it is affirmed the court below has only to proceed with its

execution. (Walters v. Mercantile National Bank of Chicago, 380 Ill. 477, 485; Re Estate of Turner, 275 Ill. App. 366, 373.)

Until there was such a determination of the rights of the parties in the county court, the circuit court was wholly without jurisdiction, and should have dismissed the appeal. (Re Estate of Turner, supra.) Jurisdiction could not be conferred by consent of the parties and was not waived by appellant's appearance and participation in the trial. Jurisdiction is a question that may be raised at any time, even upon appeal. (Werner v. Illinois Central Railroad Co., 379 Ill. 559, 566; Audubon v. Hand, 223 id. 367; Town of Kingston v. Anderson, 300 id. 577.) Cases cited by appellee, holding that one cannot try his case on one theory in the trial court and on another theory in a court of review, where the question of jurisdiction was not involved, have no application here.

The order of the circuit court entering judgment for costs against the estate to be paid in due course of administration was an appealable order. (Mayland v. Mayland, 96 Ill. App. 478, 480.) Because of the lack of jurisdiction to enter any order except one dismissing the appeal, it is unnecessary to consider any of the other contentions of the parties. The order of the circuit court is reversed and the cause is remanded to that court with directions to dismiss the appeal from the order of the county court.

Reversed and remanded with directions.

is reversed and the cause is remanded to that court with directions to dismiss the appeal from the order of the county court. The order of the district court is unnecessary to consider any of the reasons of the lack of jurisdiction to enter any order except one in appealable order. (Meyers v. Meyers, 22 Ill. App. 475, 480.) against the estate to be paid in the course of administration was The order of the district court entering judgment for costs jurisdiction was not involved, have no application here.

and on another theory in a court of review, where the question of ing that one cannot try his case on one theory in the trial court Kingstons v. Anderson, 300 Id. 577.) Cases cited by appellee, Wolf- road Co., 373 Ill. 538, 539; Anderson v. Ward, 123 Id. 567; Town of t any time, even upon appeal. (Meyers v. Illinois Central Railroad- tion in the trial court. Jurisdiction is a question that may be raised parties and was not involved by appellant's defense and jurisdiction- supra.) Jurisdiction could not be conferred by consent of the tion, and should have dismissed the trial court. The absence of error, in the county court, the district court was wholly without jurisdiction until there was a determination of the rights of the parties.

Ill. 477, 483; on appeal from that court, 225 Ill. App. 360, 373.)

execution. (Meyers v. Illinois Central Railroad Co., 225 Ill. App. 360, 373.)



OK  
Kupfer

Rec.  
5-11-43

Abstract

320 I.A. 37<sup>2</sup>

Gen. No. 9875.

Agenda No. 19.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT.  
MAY TERM, A. D. 1943.

837  
C52

VICTOR MORTVEDT,  
Plaintiff-Appellee,  
vs.  
WESTERN AUSTIN COMPANY,  
an Illinois corporation,  
Defendant-Appellant. )

Appeal from  
Circuit Court,  
Will County.

WOLFE, -- J.

On May 1, 1939, Victor Mortvedt, the plaintiff, accompanied by his friend, Samuel H. Braxton, attended a baseball game at the White Sox Park, in Chicago. Both parties lived in the City of Joliet. The trip from Joliet to the baseball park was made in an automobile owned and driven by Samuel H. Braxton. After the game, Mortvedt and Braxton started back in the automobile to Joliet. On their way home the car in which they were riding, collided with a truck of the Western Austin Company, near a tavern and filling station on Route 7 operated by a man named Ziesemer. At the time, the truck was

Witness

1913-14

1913-14

IN THE  
COURT OF THE COMMON PLEAS  
FOR THE COUNTY OF  
COLUMBIA, MISSOURI.

*[Handwritten signature]*

JOHN L. BROWN  
Circuit Court  
Columbia County

WILLIAM AUSTIN COMPANY,  
an Illinois corporation,  
Plaintiff,  
vs.  
VICTOR HORTON,  
Defendant.

1913-14

1913-14

On May 1, 1913, Victor Horton, deceased, was  
accompanied by his wife, Sarah E. Horton, attended  
personally by the late George W. Horton, who carried  
him to the City of Joliet. The trip from Joliet to the base  
half mile was made in an automobile owned and driven by Victor  
Horton. After the trip, Horton and Horton started back  
in the automobile to Joliet. On their way home the car  
which they were riding, collided with a truck of the Western  
Lumber Company, near a tavern and filling station on West  
operated by a man named [unclear]. At the time, the truck was

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being driven by Peter Lorenz, the agent and servant of the said Western Austin Company. As a result of the collision, Victor Mortvedt was seriously injured. He started suit in the Circuit Court of Will County against the Western Austin Company and Samuel H. Braxton for the damages he sustained in the accident.

The case was tried before a jury, and at the conclusion of the plaintiff's evidence, each defendant entered a motion for a directed verdict. The Court sustained the motion of the defendant, Samuel H. Braxton and instructed the jury to find him 'not guilty.' Pursuant to such instruction, the defendant, Braxton, was found 'not guilty' and was dismissed from the suit. The Court overruled the motion of the Western Austin Company, and it then introduced its evidence. The jury found the issues in favor of the plaintiff and assessed his damages at \$15,000.00. The Western Austin Company entered motions for a new trial, for judgment notwithstanding the verdict, and in arrest of judgment. The plaintiff, Victor Mortvedt, also filed a motion for a new trial alleging that the Court erred in dismissing Samuel H. Braxton as a party defendant to the suit. The Western Austin Company's motions were overruled and the plaintiff's motion likewise was overruled. Judgment on the verdict for the plaintiff against the Western Austin Company was entered for \$15,000.00. It is from this



being driven by Peter Jones, the West End resident of the  
said Western Austin Company. As a result of the collision,  
Victor Morveth was seriously injured. He sustained  
the Circuit Court of this County and the Western Austin  
Company and Samuel H. Brown for the same as to damages  
in the accident.

The case was tried before a jury, and it was  
evidence of the plaintiff's witness, who testified to the  
action for a directed verdict. The court sustained the action  
of the defendant, Samuel H. Brown, and directed the jury  
to find for the defendant. The court sustained the action  
defendant, Brown, was found 'not guilty' and was dismissed  
from the suit. The court overruled the action of the Western  
Austin Company, and it then introduced the evidence. The  
jury found the issue in favor of the plaintiff and assessed  
his damages at \$10,000.00. The Western Austin Company entered  
a motion for a new trial, for reasons relating to the  
verdict, and in arrest of judgment. The plaintiff, Victor  
Morveth, also filed a motion for a new trial alleging that  
the court erred in admitting Samuel H. Brown as a party  
defendant to the suit. The Western Austin Company's motion  
was overruled and the plaintiff's motion likewise was overruled.  
Indigent of the verdict for the plaintiff against the Western  
Austin Company was entered for \$10,000.00. It is the wish

3.

judgment that this appeal is prosecuted.

It is insisted by the appellant that the evidence is wholly lacking, in showing that the defendant was guilty of any negligence which was the proximate cause of the plaintiff's injury; also that plaintiff failed to show that he was in the exercise of ordinary care and caution for his own safety.

Victor Mortvedt testified in his own behalf and related the incidents prior to the time of the accident in question. He told about the trip to Chicago to attend the baseball game; the time they left Chicago; where they stopped on their way home and the road they took; of stopping at a tavern operated by a man named Schrage for a few minutes; that they then started on the road to Joliet; that it was dusk when they left Schrage's place; that when they left Schrage's it was 8:10 p.m; that immediately after they left this place, Mr. Braxton turned on the lights of his automobile; that he rode as Braxton's guest in the automobile and had no control over it; that they were travelling at the rate of 50 to 55 miles per hour; that Braxton was a careful driver, and he felt perfectly secure while riding with Braxton without any suggestions as to how Braxton was to handle his car; that as they were driving towards the scene of the accident, he and Mr. Braxton were visiting; that the collision occurred, and he was rendered unconscious, and did not remember anything from that time until he became conscious in the hospital after the accident. He described his injuries, treatment and time spent in the hospital. He further testified that after he had

judgment that this appeal is presented.

It is insisted by the appellant that the following is wholly untrue, in so far as the defendant was guilty of any negligence which was the proximate cause of the plaintiff's injury; and that defendant failed to show that he was in the exercise of ordinary care and caution for his own safety.

Victor Kestved testified in his own behalf and related the incidents prior to the time of the accident in question. He told about the trip to Chicago to attend the baseball game; that they left Chicago; where they stopped on their way home and the road they took; of stopping at a tavern operated by a man named Swine for a few minutes; that they then started on the road to Joliet; that it was dark when they left Swine's place; that when they left Chicago's place was 6:10 p.m.; that they left after they left this place, 6:15 p.m.; that he turned on the lights of his automobile; that he was as Braxton's guest in the automobile and had no control over it; that they were traveling at the rate of 35 to 55 miles per hour; that Braxton was a careful driver, and he felt perfectly secure while riding with Braxton without any suggestion as to how Braxton was to handle his car; that as they were driving towards the scene of the accident, he and Braxton were talking; that the collision occurred, and he was rendered unconscious, and did not remember anything from that time until he became conscious in the hospital after the accident. He described his injuries, treatment and time spent in the hospital. He further testified that after he had



been discharged from the hospital, he measured the distance from Schrage's place, to Zieseemer's tavern and it is six and three tenths miles; that from the crest of the hill east, to the drive leading into Zieseemer's tavern is 1,585 feet; that the distance from the east driveway into Zieseemer's tavern to the west drive where it goes out is 210 feet.

The plaintiff called Samuel H. Braxton as an adverse witness. His testimony is practically the same as Mortvedt, as to where they had been prior to the accident. He stated that as they left Schrage's place, he turned on the lights; that he was familiar with the road and had travelled it many times, and knew the location of Zieseemer's tavern; that he would estimate the speed of his car, on approaching the tavern, at about 50 miles per hour; that previous to that time he had been travelling between 50 and 55 miles per hour; that as he approached the tavern, he noticed the truck come onto the highway; that he blew his horn and the truck was pointed towards the southwest; that when he first saw the truck, it was his impression that it was not in motion; that the truck immediately came onto the highway at the west side of the driveway at the filling station at a rate of about 10 miles per hour; that he, Braxton, applied his brakes as hard as he could, and continued to apply them; that he swung over to the south lane of the traffic to miss striking the truck, but he thought he saw a light of another car approaching from the

been observed from the fact, however, that it is  
from Johnston's place, to Johnston's house and it is  
and these things which, from the nature of the light,  
to the drive leading to Johnston's house is a short  
that the distance from the main highway to Johnston's  
house is not more than 100 feet or so.  
The plaintiff called several witnesses to the scene  
where, this fact being in question, the witness  
as to where the car was when it was involved. He stated  
that as they left Johnston's place, he turned on the lights  
and that he was familiar with the road and was traveling at a  
time, and that the location of Johnston's house, that he  
would estimate the speed of the car, on approaching the scene,  
at about 30 miles per hour; that he decided to turn to the  
been traveling between 20 and 30 miles per hour; that as he  
approached the scene, he noticed the truck and only the  
slightly; that he then saw the car and the truck was  
towards the southwest, and when he saw the car, it  
was his impression that it was not in motion; that the truck  
immediately came into the highway at the west side of the  
highway at the William location at a time of about 10 miles  
per hour; that he, the witness, noticed the truck as it was  
coming, and continued to apply the brakes; that he was not so  
close to the car as to make out the color of the car, but he  
thought he saw a light of another car approaching from the

5.

west, and he pulled back to the right, then to the left and again saw the lights, and he attempted to dodge the truck, but he hit the left rear corner of the same, and he was knocked unconscious; that at the time of the impact, he thought his car was about astraddle of the center line of the public highway; that as he approached the truck, the driver in the cab could have seen him from the cab window; that he had his car recently overhauled, and the brakes and everything were in good working order; that there were no burning lights on the truck when he first saw it, or immediately prior to the collision.

On cross-examination he testified that at the time of the collision, the rate of speed of his car was about 15 miles per hour; that he first saw the truck at a distance of about 300 feet; that he could not see plainly for it was dusk, but he knew that the truck was at the side of the road, and if there was any reflection of the lights on the back of the truck, they were not visible to him; that after the truck came onto the road, it slowed down; that when he first saw the lights coming from the west, was just before the collision, and that was when he first realized that the truck was coming onto the highway.

Several doctors were called to describe the plaintiff's injuries. As there is no assignment of error that the damages were excessive, it is unnecessary to quote any of the medical testimony.



west, and he walked back to the place, but in the dark he  
again saw the light, and he attempted to follow the light,  
but he did not see the light again of the road, and he was  
looking into the distance, and he was not looking at the  
road, and he was not looking at the light, and he was not  
the public highway; that as he approached the light, the  
driver in the car could have seen him from the car, and  
that he had his car recently overhauled, and the engine was  
overhauled with in good working order, and that he was not  
burning lights on the road when he first saw it, and he was not  
prior to the collision.

On cross-examination he testified that at the time of  
the collision, the rate of speed of his car was about 15 miles  
per hour; that he did not see the light at a distance of 300  
feet; that he could not see the light for it was dark, and  
he knew that the light was at the side of the road, and it  
there was any reflection of the light on the side of the  
road, they were not visible to him; that after the collision,  
came onto the road, it slipped down; that when he first saw  
the light coming from the west, was that before the collision,  
and that was when he first noticed that the road was coming  
onto the highway.

Several doctors were called to describe the plain-  
tiff's injuries. It was shown that there is no assignment of error that  
the doctors were excessive, it is unnecessary to quote any  
of the medical testimony.

6.

Dr. Leonard F. Roblee was called to the scene of the accident. He was not present in Court, and his deposition was read in evidence. In answer to the question whether he made any particular note of where the car of the defendant, Braxton, was located, he answered that he drove his car right off the edge of the highway into the Ziesemer yard, and got out of his car and walked almost directly across the hard road to the car where Mr. Mortvedt was; and that it could not have been more than 15 or 20 feet away.

Wm. Raymond Clark testified that he, at the time of the accident, was chief of the fire department of the City of Lockport, and was called to the scene of the accident; that he was familiar with the entrance to and the driveway out of Ziesemer's tavern; that the driveway from the tavern is part of the driveway coming out of the Ziesemer home; that Mr. Mortvedt's car was 15 or 20 feet west of the driveway running south from the house. The plaintiff then rested his case, and the Court passed upon the motions heretofore mentioned.

No one except the occupants of the car and Fred Pehling saw the accident occur.

The defense called Peter Lorenz, who was driving the truck. He testified that he had been in the habit of driving the truck from Aurora, Illinois, to the defendant's plant at Harvey, Illinois; that he was acquainted with this road;

Mr. Leonard J. Roelke was called to the scene of the accident. He was not present in court, and his testimony was read in evidence. In answer to the question whether or not any particular note of where the car of the defendant, Greenberg, was located, he answered that he drove his car right off the edge of the highway into the ditchman yard, and out of his car and walked almost directly across the ditch road to the car where Mr. Westvedt was; and that he could not have been more than 15 or 20 feet away.

Mr. Raymond Clark testified that he, at the time of the accident, was chief of the fire department of the city of Rockport, and was called to the scene of the accident; that he was familiar with the entrance to and the driveway out of Alton's tavern; that the driveway from the tavern is part of the driveway coming out of the Alton house; that Mr. Westvedt's car was 15 or 20 feet west of the driveway running south from the house. The plaintiff also testified in case, and the Court passed upon the motion for a verdict mentioned.

to one except the occupants of the car and their relatives saw the accident occur. The witness called Peter Larson, who was driving the truck. He testified that he had been in the habit of driving the truck from Harvey, Illinois, to the defendant's plant at Harvey, Illinois; that he was acquainted with this road;



7.

that he stopped at Ziesemer's tavern about 7:30 p.m. on the day of the accident; that he was driving the Company's truck, which weighed 7,500 pounds when unloaded; that he had on a load of castings and windshields, which weighed two and one-half tons; that the truck was 23 feet 6 inches long; that he stopped at the gasoline pump and ordered 5 gallons of gas, put in the truck; that he went into the tavern to get something to eat; that he ate a bowl of soup; that he was at the place about one-half hour; that he went out to his truck and turned on his lights; that he walked around back of the truck to see if the truck's red lights were on, and then to see that the front lights were on; that the truck was equipped with reflectors which showed red when headlights are cast upon them; that he got into the cab and started the motor and pulled away from the pump; that he was on the south side of the pumps and he pulled out toward the pavement and stopped; that the truck then was facing southwest; that he looked in both directions, but saw no car coming; and he saw to the top of the hill east on the hard road, and that there was no car coming from the east or west; that he pulled onto the highway to the north side of the slab; that there was a gravel road, which crossed route 7, about 425 feet west of Ziesemer's driveway, and it was about half way between the tavern and this cross road, when the rear of his truck was struck by Braxton's car; that at this time his truck was travelling

[illegible]

8.

about 10 to 12 miles per hour; that after the collision, which injured his truck, he could not stop the truck at once, but he drove down within about 100 feet of the cross road; that he did not see the Braxton car until after the accident; that he went back to the place where the Braxton car was at the side of the road; that there were no other cars coming either from the east or the west. On cross-examination this witness was asked whether or not he had made a statement in the States Attorney's Office that the accident occurred about 8:30 p.m. He stated that he did not remember. He also stated that he did not remember making other statements relative to what he saw of the Braxton car prior to the accident.

Robert Ziesemer testified that the tavern owner and station owners were his grandparents; that he was home from the army on a furlough on this night of the accident; that he did not hear the truck leave the station, but saw it before it got onto the hard road; that he was looking out the front window and saw the red lights burning on the rear of the truck; that then he heard the crash and ran out and saw Braxton's Chrysler car about half way between the gravel road, and the driveway and about 40 feet west of the driveway; that he examined the highway and saw some prints of rubber marks on it which led up to the rear end of the Chrysler car; that these marks were from 30 to 35 feet long and started across from where the Chrysler car was standing; that there was some broken glass from the windshields on the north side of the crossing on the hard road.





George Krohn testified that he was at Zieseemer's tavern at the time of the accident playing cards with four other gentlemen and that his attention was called to the accident by Fred Pehling; and that they went out of the door to see the wreck; that in his judgment, the Braxton car was half way between the tavern and the cross roads; that at the time of the accident, it was dusk, but not dark; that while he was at the scene of the accident a car came from the west and hit the Chrysler car and ran about 50 or 60 feet east and stopped. He estimated the speed of this car to be 35 miles per hour.

Mrs. Marjorie Bentley testified that she was riding with her husband on route 7, driving west; that about two miles east of the Zieseemer's place, the plaintiff and Braxton passed them, and in her opinion, they were going about 70 miles per hour.

Franklin Bentley's testimony was practically the same as Mrs. Bentley's relative to what occurred prior to the time of the accident. He also testified to seeing skid marks on the pavement near the scene of the accident. There was an attempt made by the defendant to show by this witness that skid marks appeared on a photograph Exhibit 8. The Court refused to allow the witness to testify in regard to this matter. On cross-examination the witness stated that he had no knowledge whatsoever, of the speed of the Chrysler car after it passed over the hill; that in his opinion, the sun

George Irvine testified that he was at the

tavern at the time of the accident having dined with

other witnesses and that his attention was called to the

accident by Ted Taylor; and that they went out of the door

to see the wreck; that in his opinion, the accident was

half way between the tavern and the cross roads; and at the

time of the accident, it was dark, but not raining; that while

he was at the scene of the accident a car went down the road

and hit the Chrysler car and ran about 50 or 60 feet east and

stopped. He estimated the speed of that car to be 15 miles

per hour.

Mrs. Isabelle Bentley testified that she was riding

with her husband on route 7, driving west; that about two miles

east of the accident's place, the plaintiff and Jackson passed

them, and in her opinion, they were going about 10 miles per

hour.

William Taylor's testimony was substantially the

same as Mrs. Taylor's relative to what occurred prior to

the time of the accident. He also testified to seeing this

car on the pavement near the scene of the accident. There

was an attempt made by the defendant to show by this witness

that this car appeared on a photograph marked 8. The

Court refused to allow the witness to testify in regard to

this matter. On cross-examination the witness stated that he

had no knowledge whatsoever, of the speed of the Chrysler car

after it passed over the hill; that in his opinion, the car



had hardly set at the time of the accident; that at the scene of the accident he looked at the sunset, and looked up and saw headlights coming from the west. He judged the speed of this car to be 50 miles per hour. He heard the driver of the car apply his brakes and saw him hit the Chrysler car.

Charles F. Ziesemer testified that he was operating the filling station, lunch room and tavern on route 7; that he was in the tavern on May 1, 1939; that there was a bunch in the tavern playing cards at that time, and they all jumped up and ran out and said, "There was an accident;" that he looked out of his place of business, but could not see it; that he could see 150 feet west of the door of his tavern; that he did not hear the crash. Later he walked down to the place, and saw broken glass lying on the pavement, and he took a wheelbarrow and hauled it off.

Fred Prehn testified that he lived in Joliet, Illinois, and was Secretary of the Lion's Club of that City; that he recalled the accident in which Mr. Braxton and Mr. Mortvedt figured; that on that evening the Lion's Club was entertaining the Elgin Lion's Club and that Mr. Braxton had purchased tickets for this function and had indicated his intention to attend it.

Robert Swanson testified that he was with a party that was playing cards in Ziesemer's tavern; that he heard about the accident and went down the road and saw the car and truck; that the car was nosed into the ditch on the south side



of the road; that there were two men in the car and we tried to get them out, but the door was stuck fast and we could not open it; that the party on the driver's seat opened the door and we pulled him out. In his opinion the accident occurred about eight o'clock. He did not know whether that was standard or daylight saving time, but it was dusk, fairly dark. It was not daylight.

Fred Pehling testified that he lived in Lockport; that he was in Ziesemer's tavern May 1, 1939, with the party that was playing cards; that he was watching the game, but was not playing; that he remembered the accident which happened that evening. He went outside the tavern, a place east of the tavern, and that he saw the truck parked near the station pumps; that the driver was in the station and followed him out; that he saw the truck in motion, as he was east of the station building; that the truck started southwest towards highway number 7; that the lights on the rear of the truck were lit; that the truck kept in continuous motion after it started; that at that time he was walking west towards the filling station, and after the truck got onto the hard road, it was travelling at a rate of 15 to 20 miles per hour; that about that time his attention was attracted by the hum and roar of a motor car coming from the east; that this car came over the hill; that its headlights were on; that he heard the hum of the motor before he saw the lights coming over the hill



of the road; that there was a car in the road; that  
 to get near it, but the door was shut and he could not  
 open it; that the driver of the driver's seat opened the door  
 and he got in the car. In his opinion the accident occurred  
 about eight o'clock. It did not seem to him that the car  
 on which he was riding was in any danger. It was  
 not damaged.

That evening testified that he lived in Jackson;  
 that he was in Jackson's tavern May 1, 1903, with the party  
 that was playing cards; that he was watching the game, but  
 was not playing; that he remembered the accident when he was  
 last evening. He was outside the tavern, a place east of the  
 tavern, and that he saw the truck parked near the station house;  
 that the driver got in the station and followed him out; that  
 he saw the truck in motion, as he was east of the station  
 building; that the truck started southeast towards the  
 corner; that he lights of the rear of the truck were lit;  
 that the truck kept in continuous motion after it started;  
 that at that time he was walking west towards the filling  
 station, and after the truck got onto the main road, it was  
 travelling at a rate of 15 to 20 miles per hour; that about  
 that time the attention was attracted by the truck and soon  
 a motor car coming from the east; that this car came over  
 the hill; that the headlights were on; that he saw the front  
 of the motor before he saw the lights coming over the hill.

from the east; that he watched the automobile from where he first saw the lights at the top of the hill, saw it pass the filling station, and pass in front of the point where he was standing. In his opinion, it was travelling at a rate of speed about 75 to 80 miles an hour, and that the headlights were lit on the automobile. After it had passed where he was standing, it crashed into the same truck that he had just seen leaving the filling station; that the impact, in his opinion, took place between 150 and 200 feet west of the driveway and east of the gravel cross road; that he ran into the filling station and told the people what had happened; that he and the other people from the tavern went down to the accident; that he saw two men in a car; that the door was jammed, and he could not open the door; then the ambulance and fire department came. On cross-examination he testified that he did not know whether the headlights on the truck were lit or not; that it was a clear night; it was "just dusk, in between;" that he saw the car coming from the crest of the hill; that there was no car coming east at that time; that he saw the truck proceeding southwesterly and west, and the car coming over the hill in back of him at the same time, because he turned and walked sidewise about 15 or 20 feet; that he watched the car coming over the hill down to the intervening space to the tavern, and then west; that he expected an

from the east; that he watched the ambulance from where he first saw the lights at the top of the hill, and as soon as the filling station, and passed in front of the house where he was standing. In his opinion, it was travelling at a rate of speed from 75 to 80 miles an hour, and that the headlights were lit on the automobile. After it had passed where he was standing, it entered into the same track and he had just seen leaving the filling station; that the light, in his opinion, took place between 100 and 200 feet west of the driveway and east of the gravel cross road; that he ran into the filling station and told the people what had happened; that he and the other people from the tavern went down to the accident; that he saw two men in a car; that the door was jammed, and he could not open the door; then the ambulance and the department came. On cross-examination he testified that he did not know whether the headlights on the truck were lit or not; that it was a clear night; it was "just dark, in between;" that he saw the car coming from the crest of the hill; that there was no car coming west at that time; that he saw the truck proceeding westerly and west, and the car coming over the hill in front of him at the same time, because he turned and looked sideling about 15 or 20 feet; that he watched the car coming over the hill down to the intersection to the tavern, and then west; that he expected an



accident to happen from the time he first saw the car coming over the hill. That in walking back from the toilet to the tavern; that it was about 30 feet north of the north line of the pavement, and the tavern is about the same distance north of the toilet and is in line east with the tavern.

Before taking the testimony, the amount of the hospital, doctor's, nurse's, ambulance bills etc., were stipulated to be the amount plaintiff claimed. The stipulation does not cover the report for X-rays etc. It was further stipulated that the defendant, the Western Austin Company's Exhibits, 1 to 12 (photographs) might be received in evidence. The photographs show the damaged car, truck, tavern and the roads around the tavern.

There are many minor points that are in dispute in this case, but the principal ones may be summed up as follows: First, "What was the speed of the Braxton car at, and prior to the time of the collision in question?" Mr. Braxton, an experienced driver, and Mr. Mortvedt also an experienced driver, testified that in their opinion they were travelling at a rate of speed of between 50 and 55 miles per hour. The only evidence that contradicts it in any manner is that of Mr. and Mrs. Bentley who stated, that in their opinion that about two and one-half miles east of the scene of the accident the Braxton car passed them at the rate of speed of about 70 miles per hour, and Pehling's testimony. The undisputed evidence, is that from the east side of the drive that enters the Ziesemer's tavern, to the crest of the hill, is at least 1,550 feet, and

of the toilet and is in line with the toilet.  
The pavement, and the toilet is about the same distance from  
the toilet. It was about 50 feet from the toilet and  
over the hill. That is within range of the toilet to the  
toilet to prevent from the toilet and the toilet.

before leaving the testimony, the witness in the  
hospital, doctor's, nurse's, attendance bill etc., were  
attempted to be the money, identifi eliminated. The atten-  
tion does not cover the report for X-rays etc. It was  
further suggested that the defendant, the witness, and  
Gordon's X-rays, 1 to 12 (photographs) after he received  
in evidence. The photographs are the damaged and, first,  
cavern and the roads around the cavern.

There are some other points that are in dispute in this case, but the principal ones may be stated as follows: First, What was the speed of the Preston car at, and prior to the time of the collision in question? Mr. Preston, an experienced driver, and Mr. Norbert also an experienced driver, testified that in their opinion they were traveling at a rate of speed of between 30 and 35 miles per hour. The only evidence that contradicts it in any manner is that of Mr. and Mrs. Gaudier who stated, that in their opinion that about two and one-half miles east of the scene of the accident the Preston car passed them at the rate of speed of about 15 miles per hour, and following's testimony. The undisputed evidence is that from the east side of the drive that enters the Town of Dover, to the west of the mill, is at least 1,500 feet, and

that from the west of the driveway to the east of the driveway is 210 feet; that the accident occurred at the west end of that driveway, so it became a question of fact for the jury to decide what the speed of the car was just prior to, and at the time of the accident and whether it was being driven at an unreasonable rate of speed, and if so, whether that was one of the contributing causes of the accident.

Another question is "Where did the accident occur?" The plaintiff's testimony is that it occurred about 15 or 20 feet west of the west drive into the tavern and filling station. Doctor Roblee gave his reasons for remembering the location where Mr. Braxton's car was after the accident; that is, that he drove into Ziesemer's family drive, which is a part of the tavern drive; that he was Mr. Ziesemer's family physician; that he parked his car there and walked nearly directly south 15 to 20 feet to the scene of the accident.

Mr. William Raymond Clark, Chief of the Fire Department, was called as the plaintiff's witness, and stated that the Chrysler car, in his judgment, was 15 to 20 feet west of the driveway, that is the driveway leading into the house; that the driveway is a part of the tavern driveway. Mr. Braxton stated that in his opinion, the motor truck was just leaving the tavern driveway when the accident occurred. On the other hand, the witnesses for the defendant placed the scene of the



that from the west of the driveway to the east of the driveway is 210 feet; that the accident occurred at the west end of that driveway, so it became a question of fact for the jury to decide what the speed of the car was just prior to, and at the time of the accident and whether it was being driven at an unreasonable rate of speed, and if so, whether that was one of the contributing causes of the accident.

Another question is "Where did the accident occur?" The plaintiff's testimony is that it occurred about 15 or 20 feet west of the west drive into the tavern and filling station.

Doctor Folger gave his reasons for remembering the location where Mr. Prudden's car was after the accident; that is, that he drove into Misses's family drive, which is a part of the tavern drive; that it was Mr. Misses's family physician; that he parked his car there and walked nearly directly south 15 to 20 feet to the scene of the accident.

Mr. William Raymond Clark, chief of the fire department, was called as the plaintiff's witness, and stated that the Chrysler car, in his judgment, was 15 to 20 feet west of the driveway, that is the driveway leading into the house; that the driveway is a part of the tavern driveway. Mr. Erickson stated that in his opinion, the motor truck was just leaving the tavern driveway when the accident occurred. On the other hand, the witnesses for the defendant placed the scene of the

accident from 150 to 250 feet west of the tavern. This was also a clear cut issue of fact for the jury to determine.

There is also a conflict in the evidence as to the distance the plaintiff was away from the truck at the time the truck drove onto the highway. Bearing upon the conduct of Braxton just prior to, and at the time of the accident, is the question whether or not a car showing headlights was approaching from the west towards the scene of the accident. Mr. Braxton stated positively that he pulled out to the left to pass the truck, and he thought he saw the headlights of an approaching car, and would not have time to go around the truck and avoid a collision. The driver of the truck said he saw no lights of an approaching car. It is conceded that a short distance west of where the accident occurred, there was a cross road and it might well be that Braxton was as correct in his belief that he saw lights approaching the car, as Lorenz was in his statement that he saw none. It was very easy for an approaching car to turn to the right or left onto this gravel road, and in the excitement, for no one would notice such car. These were all questions of fact which are clear cut issues for the jury's determination.

As before stated, only the plaintiff, S. H. Braxton and Fred Pehling claimed to have actually witnessed the collision. Mr. Pehling's testimony is worthy of consideration. He testified concerning the lights on the truck, and how the

accident from 150 to 200 feet west of the house. This was also a clear cut issue of fact for the jury to determine.

There is also a conflict in the evidence as to the

distance the plaintiff was away from the truck at the time the truck drove onto the highway. Testimony from the company of Braxton just prior to, and at the time of the accident,

is the question whether or not a car moving towards the approaching truck from the west towards the house of the accident. Mr. Braxton stated positively that he pulled out to the left

to pass the truck, and he thought he saw the plaintiff as an approaching car, and would not have time to avoid the

truck and avoid a collision. The driver of the truck said he saw no lights in an approaching car. It is conceded that a short distance west of where the accident occurred, there

was a cross road and it might be that Braxton was as correct in his belief that he saw lights approaching the car as Lorenz was in his statement that he saw none. It was very

easy for an approaching car to turn to the right or left onto this gravel road, and in the excitement, for no one would notice such a car. These were all questions of fact which the

clear cut issues for the jury's determination. As before stated, only the plaintiff, E. M. Braxton

and Fred Verling claimed to have actually witnessed the collision. Mr. Verling's testimony is worthy of consideration. He testified concerning the lights on the truck, and how the



truck drove away from the pumps onto the highway and down the road. It will be noted that he testified that as soon as he saw the Braxton car coming over the hill, over a third of a mile away, (which, if he is correct in his estimation, would be 1,760 feet,) that he walked sidewise, because he expected an accident to happen. Surely the jury would be justified in coming to the conclusion that there would be nothing in the sight of the car 1,760 feet away, which would lead this man to believe that there was going to be a collision, but rather that there must have been something either in the way the truck was being handled, or its position on or near the highway that would cause this man to expect an accident.

Practically all the witnesses for the defense had made statements previously as to how the accident had occurred. While their testimony at the trial is in general the same, there are some former statements in which there are some discrepancies in their version of how it occurred. These were questions of fact that was the province of the jury to listen to and decide.

In *Trust Co. of Chicago v. Ancateau*, 317 Ill. App. 186, we said: "The law is, that a verdict will not be set aside in this court as being against the weight of the evidence, unless it is against the manifest weight of the evidence. (*Corcoran v. City of Chicago*, 373 Ill. 567.) In suits at law, where there is a conflict in the testimony, it is for the jury to weigh and determine the evidence admitted by the

truth drove away from the group when the witness testified  
 the road. It will be noted that he testified that he saw  
 as he saw the tractor car coming over the hill, over a hill  
 at a side way, (which) it is covered in his testimony.  
 would be 1,700 feet, that he walked across, because he  
 appeared an accident to happen. There was just what he  
 testified in coming to the conclusion that there was  
 nothing in the light of the car 1,700 feet away, which would  
 lead him to believe that there was going to be a collision.  
 but rather that there must have been something other in the  
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In *Irish Co. v. Chicago v. Interstate*, 317 Ill. 411, 1923,  
 1923, we said: "The law is, that a verdict will not be set  
 aside in this court as being against the weight of the evidence,  
 unless it is against the manifest weight of the evidence."  
 (*Carroll v. City of Chicago*, 317 Ill. 407, 1923). In *Irish Co.*  
 case, there was a conflict in the testimony, it is for  
 the jury to weigh and determine the evidence against the

court as competent. (Mirick v. T. J. Forschner Contracting Co., 312 Ill. 343; Philabaum v. Lake Erie & W. R. Co., 315 Ill. 131.) The above cases make it clear that a reviewing court is not to infringe on the right of trial by jury by weighing and determining if the plaintiff has proved his case by a preponderance of the evidence. (Carney v. Sheedy, 295 Ill. 78.) We do not overlook the rule that where the verdict or decree is clearly and palpably contrary to the weight of the evidence, it is the province and duty of a reviewing court to reverse, but where the evidence is conflicting, that of each party being sufficient, when considered alone, to justify a finding in favor of such party, the rule referred to is not to be applied for the reasons stated in the cases above cited."

In the present case the jury heard the witnesses testify, and saw how they acted upon the witness stand, and are therefore in a better position to weigh the testimony than a court of review. Considering the plaintiff's evidence alone, it makes a prima facie case, and he was entitled to recover. After a review of all the evidence, we cannot say that the verdict of the jury is against the manifest weight of the evidence.

It is insisted by the appellant that the Court erred in refusing to allow Franklin Bentley to testify that the marks shown on the photograph, plaintiff's exhibit No. 8, are skid marks. This photograph was introduced in evidence and



court as competent. [Hill v. E. J. Thompson, 100 Cal. 211, 313; Hill v. E. J. Thompson, 100 Cal. 211, 313.] The above cases are all cases of review of the trial of the right of trial by jury. In weighing and determining if the plaintiff has proved the case by a preponderance of the evidence. (Carter v. Carter, 100 Cal. 211, 313.) To do not overlook the fact that the verdict of the jury is a final and authoritative one in the weight of the evidence, it is the province and duty of the reviewing court to reverse, set aside and award a new trial, that of each party being sufficient, after consideration alone, to justify the finding in favor of the party, the rule referred to is not to be applied for the reason stated in the cases above cited."

In the present case the jury heard the witnesses testify, and the law that acted upon the witness stand, and are therefore in a better position to weigh the testimony than a court of review. Considering the plaintiff's evidence alone, it makes a prima facie case, and he was entitled to recover. After a review of all the evidence, we cannot say that the verdict of the jury is against the manifest weight of the evidence.

It is insisted by the appellant that the Court erred in refusing to allow Franklin Bentley to testify that the marks shown on the photograph, plaintiff's Exhibit No. 1, were said marks. This photograph was introduced in evidence and

was taken five days after the accident occurred. The jury had this photograph before them, and they also heard the witnesses say that on the night of the accident they saw skid marks on the pavement. The evidence shows that a car described as the "Ohio car," came east shortly after the accident, at a speed estimated to be 30 to 50 miles an hour; that the driver 'slammed' on his brakes and stopped his car within a short distance; that he damaged his own car as well as hitting the Chrysler car, which was on the side of the road. Under such circumstances, we think the Court properly held that it was a question of fact for the jury, and not the witness to determine what the marks on the photograph represented.

The defendant complains that the evidence fails to show that the plaintiff was in the exercise of ordinary care and caution for his own safety at, and prior to the time of the accident. As before stated, the evidence is that Mr. Braxton was an experienced driver; that the plaintiff was riding with Mr. Braxton as a guest in his car, and had no control over it at any time. Mr. Braxton knew the road and the plaintiff did not. Both gave their opinion that he was driving the car at a speed of between 50 to 55 miles per hour. The plaintiff stated that he had nothing whatsoever to do with Braxton's management of the car, and that he thought at the time, the car was being handled in a safe and efficient manner.

was passed first after the accident occurred. The  
and the photograph before him, and after that I went to  
with him and tried to get him to tell me what happened  
which was in the photograph. The accident was that a car  
described as the "Ford car," was seen coming from the  
accident, at a speed estimated to be 30 to 40 miles an  
hour; that the driver "blamed" on his person the accident  
his car within a short distance; that he drove to the car  
as well as hitting the car from the rear, which was on the side  
of the road. Under the circumstances, we think the driver  
properly felt that it was a question of law for the jury,  
and not the witness or coroner who was asked to do  
photograph presented.

The testimony contains that the defendant told us  
that the plaintiff was in the custody of a third party  
and called for his own safety at, and prior to the time of  
the accident. As before stated, the evidence is that Mr.  
Benton was an experienced driver; that the plaintiff was  
riding with Mr. Benton as a guest in his car, and had no  
control over it at any time. Mr. Benton knew the road and  
the plaintiff did not. Both gave their opinion that he was  
driving the car at a speed of between 30 to 40 miles per hour.  
The plaintiff stated that he had nothing whatsoever to do  
with Benton's management of the car, and that he was sitting  
at the time, the car was being handled in a safe and efficient  
manner.



Even if the car had been driven as fast as the defendant's testimony seemed to indicate, this could not be held as a matter of law as being excessive, or dangerous speed. It is well known that many men and women who were considered careful drivers, prior to the gasoline rationing, did not consider 75 to 80 miles an hour an excessive rate of speed. Due care, like other questions of fact, was one for the jury to decide. The negligence of Braxton cannot be imputed to the plaintiff. Thomas vs. Buchanan 357 Ill. 270. We think the jury properly found that the evidence sustained the plaintiff in that he was in the exercise of ordinary care for his own safety.

At the conclusion of the plaintiff's evidence, the defendant, Braxton, through his attorney, entered a motion for a directed verdict, which the Court sustained. The defendant, the Western Austin Company, claims the Court erred in dismissing Braxton from the case, as it prejudiced the jury against the Austin Company. They claim the plaintiff had in his knowledge facts which he could have produced, and which were later produced by the Austin Company to show that Braxton was guilty of wilful and wanton misconduct, as charged in the plaintiff's complaint, and that Braxton being called as an adverse witness, was not done in good faith. Using their own language they say: "Mr. Mortvedt and Braxton were engaged in a sham battle, a mere exhibition of shadow boxing, with no intent eventually to hold Braxton liable." As supporting their

Even if the car was not moving as fast as the defendant's testimony seemed to indicate, this could not be held as a matter of law as being excessive, or otherwise speed. It is well known that many men and women who are considered careful drivers, prior to the gasoline rationing did not consider 25 to 30 miles an hour to be a fast drive speed. The car, like other questions of fact, was not for the jury to decide. The evidence of defendant's motion is imputed to the plaintiff. *Thomas vs. Brown*, 125 Ill. App. 2d 100. We think the jury properly found that the evidence established the plaintiff in that he was in the exercise of ordinary care for his own safety.

At the conclusion of the plaintiff's evidence, the defendant, Frank, through his attorney, entered a motion for a directed verdict, which the Court sustained. The defendant, the Western Union Company, claims that it was in violation of the contract, as it prohibited the use of its telephone lines for the plaintiff. They claim the plaintiff had in his possession facts which he could have produced, and which were later produced by the Austin Company to show that Western was guilty of willful and wanton misconduct, as charged in the plaintiff's complaint, and that Western being called as an adverse witness, was not done in good faith. Using their own language they say: "We, defendant and Western were engaged in a sham battle, a mere exhibition of shadow boxing, with no intent eventually to hold Western liable." In supporting their

contention, the defendant relies on the case of Clancy vs. Richardson et al., 332 Ill. App. page 99. The opinion in the Clancy case states facts that shows the plaintiff had made out a prima facie case of gross negligence against the driver of the motor truck, and it further shows that the plaintiff himself dismissed this defendant from the suit. The facts in the Clancy case are wholly different from those in the present one. This was a motion by Braxton that the case be dismissed as to himself. As far as the record shows, the plaintiff in good faith, filed a motion for a new trial, to have Mr. Braxton reinstated as a defendant in the case. There is a vast distinction between the Clancy case and the present one. We agree with the trial judge that the plaintiff failed to make out a case against the defendant, Braxton, and that the plaintiff was under no obligation whatsoever to call other witnesses to prove his case. The witnesses were called by the defendant, but the plaintiff claims that they are mistaken in their testimony in one vital point, namely, "As to where the accident occurred."

The appellant is not in a position to raise this question in this Court. The abstract discloses that the defendant, the Western Austin Company, filed a motion for a new trial; that the motion stated specifically at least 40 reasons wherein the trial court erred in the trial of the case, but nowhere do they mention, or state that the Court erred or that the defendant, the Western Austin Company, was prejudiced



[illegible]

by the dismissal of the defendant, Braxton, from the case. In the appellant's reply brief they claim that the question was raised under points 21 and 22 of the motion. An examination of the abstract does not sustain this contention. In the case of Doellefield vs. Travellers Ins., Co. 303 Ill. App. page 123, this Court stated the law in such cases and on page 128 of the opinion, we use this language: "If certain points in writing particularly specifying the grounds of the motion have been filed, the party filing the motion will be deemed to have waived all reasons not specified."

Plaintiff's Instruction No. 9 is: "The Court instructs the jury that on May 1, 1939, there was in force and effect certain Statutes of the State of Illinois, which provided as follows: When upon any highway in this State during the period from sunset to sunrise, every motorcycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights, or lights of a yellow or amber tint, visible at least five hundred (500) feet in the direction toward which the motorcycle or motor vehicle is proceeding; and each motor vehicle, trailer or semi-trailer shall also exhibit at least one lighted lamp which shall be so situated as to throw a red light visible for at least five hundred (500) feet in the reverse direction." It is now claimed that the Court erred in giving this instruction, because the Court had previously given the jury instructions number 5, 6, and 10, mandatory in form. They claim that the jurors were

10. Mandatory is this. They claim that the phone was  
and previously given the first identification number, 3, and  
Court tried to bring this matter before the Court.  
left in the reverse direction. It is not claimed that the  
as to those a red light vehicle for at least five minutes (300)  
vehicle it kept one lighted lamp which shall be an electrical  
and each motor vehicle, whether on public highway shall also  
toward which the movement of a motor vehicle is proceeding;  
table at least five minutes (300) feet in the direction  
showing white light, or light of a yellow or amber tint,  
one lighted lamp and every motor vehicle two lighted lamps  
the period from sunset to sunrise, every motor vehicle shall carry  
viewed as follows: When used and placed in such a position  
of the certain Statute of the State of Illinois, which pro-  
provide the same that on Oct. 1, 1930, there was in force and  
First State Insurance Co., Ltd. and others in-  
seems to have waived all reasons for appeal."



informed that the failure to exhibit a ray of light, which is visible for 500 feet would constitute proof of appellant's guilt, and authorize a verdict of guilty. It will be observed that on a review of each of these instructions that the Court qualified the instruction and stated, "That any negligence, if any, by the driver, or the defendant, must have contributed proximately to the cause of the collision, and to the injury of the plaintiff." With this in mind, we think that the jury was properly instructed.

We find no reversible error in the case, and the Judgment of the Court is hereby affirmed.

Affirmed.



320 I.A. 338

Abstract

Gen. No. 9881.

Agenda No. 9.

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
MAY TERM, A. D. 1943.

EVELYN HOWARD, Administrator of the  
Estate of Earl Robert Howard, Deceased, )  
Plaintiff-Appellee, )  
vs. )  
CHARLES IND and RAYMOND HART, )  
Defendants-Appellants. )

Appeal from  
Circuit Court,  
Winnebago County.

WOLFE, -- J.

This appeal is from a judgment for \$7500.00 entered in the Circuit Court of Winnebago County December 14, 1942, against Charles Ind and Raymond Hart, in favor of Evelyn Howard, Administratrix of the Estate of Earl Robert Howard, Deceased. This judgment was based upon the verdict of a jury in said Court. The complaint consists of two counts, which was later amended. It charged that on December 16, 1940, Kishwaukee Street was a north and south public highway in the City of Rockford, Illinois, running in a southerly direction from said



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400

Gen. No. 1000

STATE OF ILLINOIS

IN SENATE

January 10, 1900

WILLIAM HOWARD, Administrator of the  
Estate of Earl Robert Howard, deceased,  
Plaintiff-appellee,

vs.

CHARLES L. and RAYMOND W. HOWARD,  
Defendants-appellants.

State of Illinois,  
Circuit Court,  
Southern District.

WORLD, -- 1.

This appeal is from a judgment for \$100,000 entered

in the Circuit Court of Cook County, Illinois, December 14, 1900,

against Charles L. and Raymond W. Howard, in favor of William Howard,

Administrator of the Estate of Earl Robert Howard, deceased.

This judgment was based upon the verdict of a jury in said

Court. The complaint consisted of two counts, which were later

amended. It charged that on December 14, 1900, William

Howard was a north and south public highway in the City of

Rockford, Illinois, running in a southerly direction from said

2.

City to Camp Grant and was a paved concrete slab and was designated as 'preferential highway;' that on said date Earl Robert Howard was riding in a motor vehicle driven by Charles Joseph Howard on said highway; that said Charles Joseph Howard was not the decedant's servant or agent, and was not subject to his direction or control; that on said date the defendant, Charles Ind, was the owner of a certain motor truck used for carrying gravel, which was being operated by the defendant, Raymond Hart, who was in the employ, and was a servant and agent of the said Charles Ind; that the motor vehicle in which Earl Robert Howard was riding was being driven in a southerly direction on said highway, and as it approached a point where a private driveway leads from a gravel pit on the West side of said highway, the truck of the defendant was then being driven in an easterly direction on said driveway by the defendant, Raymond Hart; that said truck was being driven at a high rate of speed as it approached the highway on which the plaintiff's intestate was riding, and without first being brought to a stop, drove directly in front of the automobile in which the Howard's were riding, and that the truck, and the car in which the plaintiff's intestate was riding collided, and that the plaintiff's intestate received injuries from which he died.

It is further charged in the complaint that it was the duty of the defendants to so operate, drive, manage and

City of New York and was a gravel concrete slab and was designated as 'proposed highway'; that on said date that Robert Howard was riding in a motor vehicle driven by Charles Joseph Howard on said highway; that said Charles Joseph Howard was not the decedent's servant or agent, and was not entitled to the direction or control; that on said date the defendant, Charles Loh, was the owner of a truck which was used for carrying gravel, which was being operated by the defendant, Raymond Hunt, who was in the cargo, and was a servant and agent of the said Charles Loh; that the motor vehicle in which said Robert Howard was riding was being driven in a southerly direction on said highway, and as it approached a point where a private driveway leads from a gravel pit on the West side of said highway, the truck of the defendant was then being driven in an easterly direction on said driveway by the defendant, Raymond Hunt; that said truck was being driven at a high rate of speed as it approached the highway on which the plaintiff's intestate was riding, and without first being brought to a stop, drove directly in front of the automobile in which the Howard's were riding, and that the truck, and the car in which the plaintiff's intestate was riding collided, and that the plaintiff's intestate received injuries from which he died.

It is further charged in the complaint that it was the duty of the defendant to so operate, drive, manage and



3.

control said motor truck at the junction of said private driveway with said public highway so as not to injure any person rightfully upon said highway including the deceased; also that it was then and there the duty of said defendants to bring said motor truck to a stop before driving upon said highway, and to otherwise yield the right of way to the motor vehicle in which the plaintiff's intestate was riding at the time of the accident.

It is further charged in the complaint that at the time aforesaid, there was in full force and effect, a provision of the Motor Vehicle Act of the State of Illinois, to wit: "Chapter 95 $\frac{1}{2}$ , Paragraph 168: The driver of a vehicle about to enter or cross a highway from a private road or driveway, shall yield the right of way to all vehicles approaching on said highway." Then follows a charge, "that because the defendants failed to observe this Statute and yield the right of way to the vehicle in which the intestate was riding, he received his injuries etc."

Pursuant to an order of Court, the plaintiff was permitted to amend his complaint by adding Paragraphs 5 and 6 to Count 1: "That Section 102 of Chapter 95 $\frac{1}{2}$  of the Revised Statutes of the State of Illinois in effect on December 16, 1940, provided that it was unlawful for any person to drive or

control said motor truck at the junction of said highway  
driveway with said public highway so as not to impair any  
person rightfully upon said highway including the deceased,  
also that it was then and there the duty of said defendant  
to bring said motor truck to a stop before the right of way of  
highway, and so otherwise yield the right of way to the motor  
vehicle in which the plaintiff's intestate was riding at the  
time of the accident.

It is further alleged in the complaint that at the  
time aforesaid, there was an full force and effect, a provision  
of the Motor Vehicle Act of the State of Illinois, to wit:  
"Chapter 65, Paragraph 103: The driver of a vehicle shall  
to enter or cross a highway from a private road or driveway,  
shall yield the right of way to all vehicles approaching on  
said highway." Then follows a clause, "that because the  
defendants failed to observe this statute and yield the right  
of way to the vehicle in which the intestate was riding, he  
received his injuries etc."

Pursuant to an order of Court, the plaintiff was  
permitted to amend his complaint by adding Paragraphs 3 and  
4 to Count 1: "That Section 103 of Chapter 65 of the Revised  
Statutes of the State of Illinois in effect on December 15,  
1940, provided that it was unlawful for any person to drive or

4.

move, or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle which is in such unsafe condition as to endanger any person or property or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in Article 15 of such chapter or which is equipped in any manner in violation of such Article 15, or for any person to do any act forbidden or fail to perform any act required under said Article 15.

"It is further provided in Section 103 of said Chapter and within said Article 15 that when upon any highway in this State during the period from sunset to sunrise every motor vehicle shall carry two lighted lamps showing white lights or lights of a yellow or amber tint visible at least 500 feet in the direction toward which such vehicle is proceeding; and it is further provided in Section 112 within said Article 15 that at all times during the period from sunset to sunrise that at least two lighted lamps shall be displayed, one on each side at the front on every motor vehicle except when such vehicle is parked, subject to regulations governing lights on parked vehicles."

It is then charged that the defendant Hart at the time of the accident in question was operating the motor vehicle involved in said accident without complying with Sections 102, 103 and 112 of Article 15 of Chapter 95<sup>1</sup>/<sub>2</sub> of Revised Statutes of the State of Illinois in that he did not have two lighted



move, or for the owner to cause or knowingly permit to be  
driven or moved on any highway and which is in such  
unsafe condition as to endanger any person or property or  
which does not contain those parts or is not so equipped  
equipped with such lamps and other equipment in proper con-  
dition and adjustment as required in Article 12 of such chapter  
or which is equipped in any manner in violation of such article  
12, or for any person to so any act forbidden or fail to per-  
form any act required under said Article 12.

"It is further provided in Section 103 of said chapter

and within said Article 12 that when upon any highway in this  
State during the period from sunset to sunrise every motor vehicle  
shall carry two lighted lamps showing white lights or lights of  
a yellow or amber tint visible at least 300 feet in the direction  
toward which such vehicle is proceeding; and it is further provided  
in Section 112 within said Article 12 that at all times during  
the period from sunset to sunrise that at least two lighted lamps  
shall be displayed, one on each side at the front on every motor  
vehicle except when such vehicle is parked, subject to regulations  
governing lights on parked vehicles."

It is then claimed that the defendant knew at the time  
of the accident in question was operating the motor vehicle  
involved in said accident without complying with Sections 102,  
103 and 112 of Article 12 of Chapter 92 of Revised Statutes  
of the State of Illinois in that he did not have two lighted

5.

lamps, one on each side at the front of the motor vehicle he was so operating upon the highway in question. The complaint also alleges that the plaintiff's intestate was at all times in the exercise of due care and caution for his own safety.

The defendants did not challenge the sufficiency of this amended complaint, but filed their answer admitting many of the facts pleaded, but specifically denied any negligence on the part of the defendants, and denied the plaintiff's intestate was in the exercise of ordinary care and caution for his own safety at the time of the accident that caused the death of plaintiff's intestate.

The case was submitted to a jury which found the issues in the plaintiff's favor. The defendants entered a motion for a new trial, and specified many reasons why the same should be granted, but the Court overruled the motion and entered judgment on the verdict for \$7500.00. It is from this judgment that this appeal is prosecuted.

There are only two questions involved in this suit. First, the admissibility of certain evidence, and the other is the sufficiency of the evidence to sustain a verdict.

Evelyn Howard, the plaintiff in said case, testified that she was the widow and heir at law of Earl Robert Howard, deceased; that he had been regularly employed, and that his earnings were from \$42.00 to \$45.00 a week; that he was in

lamps, one on each side at the front of the motor vehicle. It was so operating upon the highway in question. The complaint also alleged that the plaintiff's intestate was at all times in the exercise of due care and attention for his own safety.

The defendants did not challenge the sufficiency of

this amended complaint, but filed their answer admitting the facts pleaded, but specifically denied any negligence

on the part of the defendants, and denied the plaintiff's

intestate was in the exercise of ordinary care and attention

for his own safety at the time of the accident that caused

the death of plaintiff's intestate.

The case was submitted to a jury which found the

issues in the plaintiff's favor. The defendants entered a

motion for a new trial, and specified many reasons why the

said should be granted, but the court overruled the motion and

entered judgment on the verdict for \$5000.00. It is from this

judgment that this appeal is presented.

There are only two questions involved in this suit.

First, the admissibility of certain evidence, and the other

is the sufficiency of the evidence to sustain a verdict.

Twelve months, the plaintiff in said case, testified

that the way the accident occurred was that of Earl Howard

became; that he had been regularly employed, and that his

earnings were from \$40.00 to \$45.00 a week; that he was in



6.

good health and worked steadily and supported her; that he died December 16, 1940.

May Hadd testified that she lived at 1603 Kishwaukee Street in the City of Rockford, Illinois; that her home is in an apartment building at the southwest corner of the intersection of Kishwaukee Street, and 15th Avenue; that she lives on the second floor of said building in the southeast part of the same; that Earl Robert Howard was her brother, also Charles Joseph Howard, the driver of the car in which the decedant was riding on the night of the accident; that on the evening of December 16, 1940, both brothers were at her home; that they came about five o'clock; that they had dinner at her home about 5:30 and that she heard Charles Howard and Earl Howard say they were going to the Town of Byron to get a new car that Charles Howard had purchased; that after dinner she saw her brothers, Charles and Earl go out to their automobile, and Charles got in the driver's seat and Earl on his right; that lights on the car were turned on and the car was started and they drove away; that the road where the accident happened would be on the way to the Town of Byron. The defendants objected to part of this testimony on the ground that it was too remote; that from where the witness lived to the scene of the accident was approximately 2.4 miles, and that the testimony was not a part of the res gestae. The Court overruled the

Good health and worked steadily and supported her; died in

died December 18, 1940.

My father testified that she lived at 1002 Lincoln Street in the City of Rockford, Illinois; that her house is an apartment building at the southwest corner of the intersection of Wisconsin Street and 15th Avenue; that the second floor of said building in the southeast part of the same; that Earl Robert Howard was her brother, also residing in Rockford, the driver of the car in which the accident was killing on the night of the accident; that on the evening of December 18, 1940, both brothers were at her home; that they came about five o'clock; that they had dinner at her home about 8:30 and that they called Charles Howard and Earl Howard; that they were going to the town of Byron to get a new car that Charles Howard had purchased; that after dinner she saw her brothers, Earl and Earl, go out to their automobile; that Charles got in the driver's seat and Earl on his right; that lights on the car were turned on and the car was started and they drove away; that the road where the accident happened would be on the way to the town of Byron; the defendants objected to part of this testimony on the ground that it was too remote; that from where the witness lived to the scene of the accident was approximately 2 1/2 miles; and that the testimony was not a part of the case. The court overruled the

objection and allowed the testimony to stand. At the conclusion of Mrs. Hadd's testimony, Mr. Welsh, the defendants-appellants' attorney, made a motion to strike out all of her testimony and the questions and answers in relation to what occurred in the flat that evening, "because it was not a part of the res gestae, and too remote and no continuity shown." This motion was also denied.

Mr. Howard Sassamann testified that his business was hauling milk from farms in the community, where the accident happened, to the Byron Cheese Factory; that on December 16, 1940, he was driving on Kishwaukee road between a quarter of six o'clock and six p.m; that he saw that an accident had occurred between an automobile and a truck; that he saw the truck across the road, as he approached the place where the accident occurred. He identified Plaintiff's Exhibits No. 1 and 3 and Defendant's Exhibits No. 2, 3, 4, 5 and 7. He further testified that when he arrived at the scene of the accident, the truck was standing right in front of the road that leads down to the gravel pit off the Kishwaukee road; that Plaintiff's Exhibit No. 3, shows the entrance way that leads down to the gravel pit, also the paved road at the entrance of the road to the gravel pit; that there are pillars on either side of the private drive leading down to the gravel



objection and allowed the testimony to stand. At the  
objection of Mr. Weiler, the testimony  
of the witness, made a motion to strike out all of the  
testimony and the questions and answers in relation to what  
occurred in the first trial evening, "because it was not a part  
of the case, and had no result and no controlling effect."  
This motion was also denied.

Mr. George Sebastian testified that on the night of  
Monday, July 17, 1900, he was present at the scene of the  
accident, to the Tyson House, which is located on  
Main Street, between the intersection of Main and  
Sixth Streets, at the corner of Main and Sixth Streets.  
He was driving on Main Street between a distance of  
six o'clock and six p.m.; that he saw that an accident had  
occurred between an automobile and a truck; that he saw the  
truck across the road, as he approached the place where the  
accident occurred. He identified Exhibit No. 1  
and 2 and 3 and 4 and 5 and 6 and 7. He  
further testified that when he arrived at the scene of the  
accident, the truck was standing right in front of the road  
that leads down to the gravel pit of the Wisconsin road;  
that Exhibit No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

8.

pit which were about three feet square and were seven or eight feet high; that the truck was standing facing southeast in front of the road, and that it covered practically the whole of the paved portion of the highway; that he saw the Howard brothers in the Ford Coupe, which was standing about eight feet south and east of the truck; that Charles Howard was behind the steering wheel of the Ford Coupe, and Earl was at Charles Howard's right; that there were no lights burning on the front end of the truck that night.

Avery Gage testified that on the evening of the accident in question, he was employed at Camp Grant and was driving a car for some architects who were doing some construction work on a building at Camp Grant; that between 5:45 o'clock and 6:00 p.m. on the Kishwaukee Highway he came to the scene of the accident; that his employer, Mr. Aske, who was riding with him, told him to stop; that they saw a truck standing in the middle of the road nearly crosswise of the same. They saw there had been an accident, and that some men were hurt; that he drove back to Camp Grant and called for a doctor and an ambulance, and then immediately drove back to the scene of the accident; that it was quite dark and that there were no lights burning on the front of the truck; that a Ford Coupe was about 8 to 10 feet on the south and a little east of the truck; that both of the Howards were in the Ford Coupe when they arrived at the scene of the accident. When they arrived there the second time, there

pit which were about three feet square and were about eight feet high; that the truck was standing in the middle of the road, and that it covered practically the whole of the paved portion of the highway; that he saw the Ford brothers in the Ford Coupe, which was standing about eight feet south and east of the truck; that Charles Howard was behind the steering wheel of the Ford Coupe, and Earl was in Charles Howard's right; that there were no lights burning on the front end of the truck that night.

Avery Gage testified that on the evening of the accident in question, he was employed at Camp Grant and was driving a car for some architects who were doing some construction work on a building at Camp Grant; that between 8:30 o'clock and 9:00 p.m. on the Kishwaukee Highway he came to the scene of the accident; that his employer, Mr. Ashe, who was riding with him, told him to stop; that they saw a truck standing in the middle of the road nearly crosswise of the same. They saw there had been an accident, and that some men were hurt; that he drove back to Camp Grant and called for a doctor and an ambulance, and then immediately drove back to the scene of the accident; that it was quite dark and that there were no lights burning on the front of the truck; that a Ford Coupe was about 8 to 10 feet on the south and a little east of the truck; that both of the Howards were in the Ford Coupe when they arrived at the scene of the accident. When they arrived there the second time, there



were no lights on the front part of the truck.

The deposition of Mr. Jerome Aske was read in evidence. His testimony is to the effect that on December 16, 1940, he was riding with his driver, Mr. Avery Gage, and they came upon the scene of the accident in question. As they were driving in a northerly direction, his attention was first attracted by the sudden slowing down of his own car, and he looked forward and saw the truck standing nearly diagonally across the paved part of the highway; that it was just about astraddle of the center line of the highway, and it came very nearly occupying the entire width of the pavement; that the Ford Coupe was somewhat south and east of the front of the truck; that the truck in its angular position, was very nearly pointing to the rear end of the Ford passenger car, which was about 4 feet from the edge of the pavement.

Harold Bentley was called as a witness. He said he was the Commissioner of Highways of Rockford Township, and had been such commissioner for the past 10 years and nine months; that he was acquainted with the Kishwaukee road where it was intersected by the drive down to a gravel pit in Winnebago County, Illinois. He said that Plaintiff's Exhibit No. 3 was a picture of the intersection; that the Kishwaukee road is a public thoroughfare and a paved highway, and that the road down to the gravel pit is not a public road, but is on a private property.



Harry Edward Walters testified that he lived at Oregon, Illinois; that he had known Earl Howard for about 22 years; that about 5 years prior to Earl's death, he had seen him at least every two weeks; that he had ridden in an automobile driven by Earl Howard and Earl had ridden in an automobile driven by him, (the witness;) that he knew Earl's habits as to care and caution in the ordinary affairs of life, and that he was very cautious and prudent in driving an automobile, which he always operated in a very careful manner. Wilbur Waach's testimony is to the same effect as Harry Edward Walters.

After this, the plaintiff's exhibits were offered and admitted in evidence, and the plaintiff rested his case. The defendants offered no evidence, and the case went to the jury on the plaintiff's evidence and the exhibits.

The appellants argue strenuously that the Court erred in admitting the testimony of May Hadd relative to what took place at her home prior to the accident, and as to her seeing her brothers drive away in the automobile with the lights burning a few minutes before the time of the accident. It is apparent from the record that there was no eye-witness to this accident. In the case of *Casey vs. Chicago Rys. Co.*, 269 Ill. 336 at Page 389, the Court in discussing the rule relative to the proof necessary to be produced in a death case where there was no eye-witness to the accident, and at Page 390 we find the following:



Harry Edward Walters testified that he lived at Chicago, Illinois; that he had known Earl Howard for about 15 years; that about 5 years prior to Earl's death, he had seen him at least every two weeks; that he had ridden in an automobile with Earl Howard and Earl had ridden in an automobile driven by him (the witness); that he knew Earl's habits as to cars and driving in the ordinary affairs of life, and that he was very cautious and prudent in having an automobile, which he always operated in a very careful manner. Walter's testimony is to the same effect as Harry Edward Walters.

Also, the plaintiff's exhibits were offered and admitted in evidence, and the plaintiff rested his case. The defendant offered no evidence, and the case went to the jury on the plaintiff's evidence and the exhibits.

The defendant argued strenuously that the Court erred

in admitting the testimony of Ray Webb relative to what took place at the time of the accident, and as to her seeing her brother drive away in the automobile with the lights burning a few minutes before the time of the accident. It is apparent from the record that there was no eye-witness to this accident. In the case of Casey vs. Chicago Ry. Co., 209 Ill. 306 at page 306, the Court in discussing the rule relative to the proof necessary to be produced in a local case where there was no eye-witness to the accident, and at page 306 we find the following:

11.

"It was necessary for defendant in error to allege and prove that his decedent was in the exercise of due care and caution for his own safety at the time of the accident. In cases where there are no eye-witnesses to the occurrence this allegation cannot be proven by direct testimony, but it still devolves upon the parties seeking recovery to establish the exercise of ordinary care on the part of the deceased by the highest proof of which the case is capable. (Collison v. Illinois Central Railroad Co. 239 Ill. 532; Stollery v. Cicero and Proviso Street Railway Co. 243 id. 290; Newell v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co. 261 id. 505.) The highest proof of which the case is capable may consist of other circumstances than the habits of the deceased which would tend to raise the presumption that the deceased was in the exercise of due care and caution at the time for his own safety. Where it is possible, such circumstances must be shown. The absence of such circumstances does not preclude a plaintiff, however, and if the case is not susceptible of any higher proof, then the presumption that the deceased was in the exercise of ordinary care and caution for his own safety at the time of the accident is sufficiently raised by proof that he was habitually careful, prudent and cautious in his conduct. If the deceased was habitually prudent, careful and cautious it tended to raise the presumption that he

"It was necessary for defendant to prove to plaintiff and jury that his decedent was in the exercise of due care and caution for his own safety at the time of the accident. It seems where there are no eye-witnesses to the occurrence this allegation cannot be proven by direct testimony, but it still remains open to the parties seeking recovery to establish the exercise of ordinary care on the part of the decedent by the highest proof of which the case is capable. (Collins v. Illinois Central Railroad Co. 239 Ill. 532; Seely v. Illinois and Chicago Street Railway Co. 243 Ill. 290; Kewell v. Cleveland, Cincinnati, Toledo and St. Louis Railway Co. 281 Ill. 502.) The highest proof of which the case is capable may consist of other circumstances from the habits of the decedent which would tend to raise the presumption that the decedent was in the exercise of due care and caution at the time for his own safety. Where it is possible, such circumstances must be shown. The absence of such circumstances does not preclude a verdict, however, and if the case is not susceptible of any other proof, then the presumption that the decedent was in the exercise of ordinary care and caution for his own safety at the time of the accident is conclusively raised by proof that he was habitually careful, prudent and cautious in his conduct. If the decedent was habitually prudent, careful and cautious it tended to raise the presumption that he



was in the exercise of due care and caution at the time he received the injury which resulted in his death. (Chicago, Rock Island and Pacific Railway Co. vs. Clark, 108 Ill. 113; Toledo, St. Louis and Kansas City Railroad Co. v. Bailey, 145 id. 159.) As the proof made relative to the habits of the deceased tended to raise this presumption it was sufficient to go to the jury." This case was cited with approval in Moore vs. B D & C Railroad Company, 295 Ill., Page 63; Young vs. Patrick 323 Illinois Page 200.

We think this evidence was properly admitted both for the purpose of showing due care and caution on the part of the plaintiff's intestate, and that Earl Robert Howard was not driving the car and was not an agent or servant of his brother, Charles Howard, at the time the accident occurred.

The evidence is uncontradicted that the plaintiff's intestate was a young man of very careful habits and that the presumption is that he was in the exercise of due care and caution for his own safety, just prior to, and at the time of the collision that caused his death. It has been stated that presumptions are inferences which common sense draws from the known course of events, or from the circumstances usually occurring in such cases. The sister's testimony was to the effect that she saw the lights on the car were turned on at the time the brothers left her home in Rockford, which is practically two miles from the scene of the accident. If

was in the knowledge of the crew and passengers at the time  
 received the injury which resulted in his death. (Chicago,  
 Cook Island and Pacific Mailway No. 1, Chicago, 100 East 11th  
 Toledo, St. Louis and Kansas City Railroad Co., v. Chicago, 100  
 Ill. 100.) as the proof was related to the death of the  
 deceased related to this this investigation is not sufficient  
 to the jury. This case was cited with approval in *Boyle*  
 vs. D & C Railroad Company, 100 Ill. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

as this case involves was, it is not necessary to  
 for the purpose of showing the care and attention of the part of  
 the plaintiff's interest, and it is not necessary to show  
 that the care and attention of the plaintiff was not  
 sufficient to prevent the accident.  
 The evidence is undisputed that the plaintiff's  
 interest was a young man of very careful habits and that the  
 proposition is that he was in the exercise of his care and  
 caution for his own safety, just prior to, and at the time of  
 the collision that caused the death. It has been stated that  
 the collision was unforeseen which common sense shows from the  
 known course of events, on that the circumstances usually  
 occurring in such cases. The electric coupling was in the  
 effect that was the light of the car was turned on at  
 the time the accident occurred in which case, which is  
 practically the same as the case of the accident. It

the lights were turned on when the car left Rockford, and the evidence shows that the Howard brothers were both men of careful habits, surely the jury were justified in indulging in the presumption that the lights were still burning on their car at the time the collision occurred.

There is another reason why we think the evidence was properly admitted. It tended to show that Earl R. Howard used due care and caution for his own safety at the time he left the city of Rockford just a few minutes before the fatal accident occurred. The evidence clearly shows that Charles Howard was driving the automobile when it left Rockford, and after the accident he was sitting back in the driver's seat in an unconscious condition, and his brother, Earl, was sitting at his right. The negligence, if any, of Charles Howard, the driver of the car, could not be imputed to Earl Howard who was riding as guest in his brother's car. This rule is clearly stated in the case of *Thomas vs. Buchanan*, 357 Ill., 270, at page 277, as follows: "While the deceased was required to exercise due care and caution for his own safety while riding in the Automobile of Anderson, yet, so far as the evidence discloses, he had no authority over Anderson in the operation of the automobile, and no agency being shown, the negligence of Anderson, if any, cannot be imputed to the deceased in a suit brought by his legal representative



the lights were turned on when the car left the house, and the evidence shows that the forward passenger was both seen and heard to say that the lights were still burning as they left the house. In the circumstances that the lights were still burning as they left the house, it is reasonable to conclude that the car was still running at the time the collision occurred.

There is another reason why we think the witness was properly instructed. It tended to show that when the witness saw the car and noticed for his own safety, he was in the left hand side of the road, just a few minutes before the collision occurred. The evidence clearly shows that the witness was driving the automobile when it left the house, and after the accident he was sitting back in the driver's seat in an unconscious condition, and his brother, John, was sitting at the wheel. The witness, it may be said, was driving the car, and could not be found to have been driving it as a guest in his brother's car. This was the client's stated in the case of Thomas vs. Thomas, 224 Ill. 270, at page 277, as follows: "While the deceased was required to exercise due care and caution for his own safety while driving in the automobile of his brother, yet, as far as the evidence disclosed, he had no authority over the car in the operation of the automobile, and no right of control, and the negligence of the deceased, if any, cannot be laid to the deceased as a result of his legal responsibilities."

against a third person to recover damages for injuries sustained by him which occasioned his death. (Honn v. Chicago Railway Co. 232 Ill. 378.) The question of due care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn, tends to show the exercise of due care on the part of the deceased."

It is seriously insisted that the evidence failed to show that there was any negligence on the part of the defendants in the operation of their truck, or that their negligence was the approximate cause of the injuries to the plaintiff's intestate. The evidence is uncontradicted that, after the accident, the heavy truck of the defendant was standing in front of the private driveway from the gravel pit headed a little bit to the southeast and covering nearly the whole paved portion of the highway; and that there were no lights burning on the truck at that time; that it was very dark.

The plaintiff's amended complaint charged that the defendant violated the laws relative to Motor Vehicles on the public highway, to wit, by permitting a truck to be driven, or to be moved on the highway in an unsafe condition, and which was not at all times equipped with lighted lamps, etc. The evidence

Against a third person to recover damages for injuries sustained by him which occasioned his death. (Thompson v. Chicago Railway Co., 232 Ill. 375.) The question of the care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inferences that may reasonably and legally be drawn, tends to show the negligence of one or the other of the parties.

It is respectfully insisted that the evidence is insufficient to show that there was any negligence on the part of the defendant in the operation of their truck, or that their negligence was the proximate cause of the injuries to the plaintiff's intestate. The evidence is uncontradicted that, after the collision, the heavy truck of the defendant was standing in front of the private driveway from the gravel pit located a little bit to the southeast and covering nearly the whole paved portion of the highway; and that there were no lights burning on the truck at that time; that it was very dark.

The plaintiff's amended complaint charged that the defendant violated the laws relative to Motor Vehicles in this State in that, to wit, by permitting a truck to be driven, or to be moved on the highway in an unsafe condition, and which was not at all times equipped with lighted lamps, etc. The evidence



shows that the defendants violated this provision of the Statute by driving the truck onto the highway after dark without any headlights burning. If the headlights of the truck had been burning as it approached the highway and as it entered the same, the beams from the light would have been extended across the highway. Approaching cars could see that there might be danger ahead of them, where a truck unlighted, might not be visible to a driver of an approaching car until after the truck had passed the brick pillars at the entrance of the gravel pit driveway.

This was a heavy truck as its length was approximately the width of the paved portion of the highway. The photographs show this to be a regular gravel truck with a steel bed. The evidence does not show just how the truck was driven onto the highway, but the circumstances disclosed after the accident showed that it was driven there by one of the defendants, Raymond Hart, as the agent and servant of Charles Ind, and that the driver was sitting in the driver's seat of the truck after the accident.

The appellant insists that the photographs show that the right front part of the Howard car struck the right front part of the truck of the defendant, and claim that their contention is supported by the photographs introduced in evidence. There is no question but that the right front part of the Howard

shows that the defendant violated this provision of the statute by driving the truck onto the highway after dark without any need for it. At the same time of the trial and been running as it approached the highway and as it entered the same, the beam from the light would have been reflected across the highway. A person on foot could see that light might be dangerous ahead of them, where a truck is stopped, might not be visible to a driver of an approaching car until after the truck had passed the point where it was standing at the gravel pit driveway.

This was a heavy truck as the length was approximately the width of the paved portion of the highway. The defendant shows this to be a regular gravel truck with a steel bed. The evidence does not show that the truck was driven onto the highway, but the circumstances disclosed after the accident showed that it was driven there by one of the defendants, named Hart, as the agent and servant of Charles Hart, and that the driver was sitting in the driver's seat of the truck after the accident.

The defendant insists that the photographs show that the right front part of the truck was struck the right front part of the truck of the defendant, and claim that their condition is supported by the photographs introduced in evidence. There is no question but that the right front part of the truck

car came in contact with the front of the defendants' truck. The plaintiff contends that the right front part of the Howard car struck the left front part of the defendants' truck. An examination of plaintiff's Exhibit 1, and defendants' Exhibit 1 and 4, which are photographs of the defendants' truck, clearly indicate that the defendant is mistaken in how this collision occurred. The defendants' Exhibit 4 especially shows the right front part of the defendants' truck. It will be noted that the bumper is torn loose from the left front side of the truck. The shell of the radiator is broken and pushed to the right. Defendants' Exhibit 1, the photograph of the left front part of the truck shows that the fender is crushed. The left side of the shell of the radiator is broken and pushed to the right, and the bumper is torn off at the left. The left side of the shell of the radiator is broken and shoved to the right, and the whole radiator is pushed to the right. Plaintiff's Exhibit 1 is also a photograph of the truck and nearly a front view. It shows that the left front fender of the truck is crushed; that the shell of the radiator is pushed to the right. It seems to us that the jury could believe but one thing, that is, that the Howard car came in contact with the left front part of the defendants' truck and the consequential injuries resulted.

From an examination of the testimony showing the position of the truck standing crosswise on the road, the



can now in contact with the front of the defendant's car.  
 The plaintiff contends that the right hand part of the car  
 was struck by the left hand part of the defendant's car.  
 examination of the defendant's Exhibit 1, the defendant's Exhibit  
 1 and 4, which are photographs of the defendant's car, clearly  
 indicate that the defendant's car was in contact with the plaintiff's  
 car. The defendant's Exhibit 1 especially shows the right  
 hand part of the defendant's car. It will be noted that the  
 bumper is down lower than the left hand side of the car.  
 The shell of the radiator is broken and pushed to the right.  
 defendant's Exhibit 1, the photograph of the left hand part  
 of the truck shows that the bumper is cracked. The left side  
 of the shell of the radiator is broken and pushed to the right.  
 and the bumper is down off at the left. The left side of the  
 shell of the radiator is broken and pushed to the right, and  
 the whole radiator is pushed to the right. Plaintiff's Exhibit  
 1 is also a photograph of the car and shows a front view.  
 It shows that the left hand bumper of the truck is cracked;  
 that the shell of the radiator is pushed to the right. It  
 seems to me that the jury would believe that the  
 car, that the car was in contact with the left hand  
 part of the defendant's car and the corresponding injuries  
 resulted.

There is examination of the testimony showing the  
 position of the truck standing crosswise on the road, the

17.

photograph showing the damaged part of the defendants' truck; the truck standing on the road without any lights to warn the Howards of the danger ahead, and all the evidence, it seems to us that the jury was justified in finding that defendants were guilty of negligence, as charged in the plaintiff's complaint, and caused the death of plaintiff's intestate. There is no complaint made that the jury was not properly instructed relative to the law, or any misconduct on the part of any one that might have prejudiced the jury or the verdict of the jury is excessive, in favor of the plaintiff. We find no reversible error in the case and the judgment of the trial court is affirmed.

Affirmed.





42430

320 I.A. 338

MRS. A. N. BRODT and A. N.  
BRODT,

Appellants,

v.

LANGDON, INC., a Corporation,  
Appellee.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover \$300 which she had paid on account of the purchase price of furniture and for \$700 claimed as damages on the failure of defendant to deliver the furniture, which had increased in price. Defendant filed its defense and a counter-claim. The defense admitted defendant had entered into a contract with Mrs. Brodt on May 17, 1941, for the sale of furniture to her but averred that the contract of that date "was merely a hasty resume of the price and general listing of articles given" and averred that the contract was an oral contract and not evidenced by defendant's written letter of May 17. The defense further set up was that the furniture was selected by plaintiff and was to be made by defendant, for which plaintiff agreed to pay \$1,394, \$300 cash, \$300 on delivery of the furniture and the balance, \$794, in monthly payments of \$50. Defendant further averred that plaintiff would make a selection of the furniture within a reasonable time; that defendant was ready, able and willing to deliver the merchandise she had selected "but the plaintiff refuses to sign a conditional sales contract" for the furniture "as she agreed to do" and that the furniture selected was on hand at defendant's place of business and had been tendered to her repeatedly and that plaintiff had neglected to select certain pieces of furniture the sales price of which aggregated \$188.

3201A-38

MRS. A. N. BRODT and A. N. BRODT, Defendants,

MUNICIPAL COURT,  
OF CHICAGO.

LAWSON, INC., a Corporation,  
Plaintiff.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE FOLLOWING OPINION:

Plaintiff brought suit to recover \$300 which she had paid on account of the purchase price of furniture and for \$700 claimed as damages on the failure of defendant to deliver the furniture, which had increased in price. Defendant filed its defense and a counter-claim. The defense admitted defendant had entered into a contract with the plaintiff on May 17, 1934, for the sale of furniture to her but averred that the contract of that date was merely a "ready resume of the price and general listing of articles given" and averred that the contract was an oral contract and not evidenced by defendant's written letter of May 17. The defense further set up that the furniture was selected by plaintiff and was to be paid by defendant, for which plaintiff agreed to pay \$1,004, \$300 cash, \$300 on delivery of the furniture and the balance, \$394, in monthly payments of \$30. Defendant further averred that plaintiff would make a selection of the furniture within a reasonable time; that defendant was ready, able and willing to deliver the merchandise she had selected "but the plaintiff refused to sign a conditional sales contract" for the furniture "as she agreed to do" and that the furniture selected was on hand at defendant's place of business and had been tendered to her repeatedly and that plaintiff had refused to select certain pieces of furniture the sales price of which were stated \$188.



By the counter-claim A. N. Brodt was made a party defendant. It set up substantially the same facts as those set up in the defense, that Mr. and Mrs. Brodt had selected articles of furniture aggregating \$939 and that defendant was ready, able and willing to deliver the furniture if Mr. and Mrs. Brodt would sign a conditional sales contract as they had agreed to do. That since Mrs. Brodt had not selected the furniture within a reasonable time, it had increased in price so that defendant was required to pay more than it would have been obliged to do had the selection been made seasonably. It was further alleged in the counter-claim that Mrs. Brodt orally employed defendant to supervise alterations in her home, changes in electrical installations etc., for which defendant claimed \$10 per hour for 19 hours.

There was a trial before the court without a jury, a finding against plaintiffs and in favor of defendant on its counter-claim and judgment was entered against plaintiffs for \$906. Mrs. Brodt and her husband appeal.

The record discloses that defendant was in the furniture business and Mrs. Brodt was desirous of buying some furniture and had consulted with defendant's representatives. May 17, 1941, defendant wrote Mrs. Brodt a letter in which it stated: "We agree to furnish items of furnishings listed below at a total cost of \$1394.00, payments to be \$300.00 now, \$300.00 on delivery, and balance paid monthly at \$50.00 per month without interest." Then follows a list of the several articles of furniture and the letter concludes: "Above is merely a hasty resume of price and general listing of articles. Selections not already made are to be made by you under our guidance." Upon receiving this letter Mrs. Brodt made out her check for \$300, delivered it to defendant and the check was paid. There was some delay in making the final selection of all the articles of furniture by Mrs. Brodt and about two months thereafter, Mr. and Mrs. Brodt and representatives of defendant met and the matter of the delay in making the selection,



By the counter-claim A. V. Frost and a duly selected

It set up substantially the same facts as those set up in the defense, that Mr. and Mrs. Frost had selected articles of furniture aggregating \$300 and that defendant was ready, able and willing

to deliver the furniture if Mr. and Mrs. Frost would agree to conditionally enter contract as they had agreed to do. That since Mrs. Frost had not selected the furniture within a reasonable time

it had increased in price so that defendant was required to pay more than it would have been obliged to do had the selection been made seasonably. It was further alleged in the counter-claim that

Mrs. Frost orally employed defendant to supervise alterations in

her home, changes in electrical installations etc., for which

defendant claimed 10 per hour for 12 hours.

There was a trial before the court without a jury, a finding against plaintiff and in favor of defendant on the counter-claim and judgment was entered against plaintiff for \$300. Mrs. Frost

and her husband appeal.

The record discloses that defendant was in the furniture

business and Mrs. Frost was desirous of buying some furniture and

had consulted with defendant's representatives. May 17, 1934,

defendant wrote Mr. Frost a letter in which it stated: "We agree to

furnish items of furnishings listed below at a total cost of

\$1324.00, payable to be \$300.00 now, \$300.00 on delivery, and

balance paid monthly at \$50.00 per month without interest. Then

follows a list of the several articles of furniture and the letter

concludes: "Above is merely a highly resume of price and general

listing of articles. Selections not already made are to be made

by you under our guidance." Upon receiving this letter Mrs. Frost

made out her check for \$300, delivered it to defendant and the

check was paid. There was some delay in making the final selection

of all the articles of furniture by Mrs. Frost and about two

months thereafter, Mr. and Mrs. Frost and representatives of

defendant met and the matter of the delay in making the selection,

3.

the increase in price, and whether defendant would investigate the Brodts' financial standing to determine whether credit should be extended were discussed.

Mr. Kepley, who was president and treasurer of defendant corporation and Virginia McWilliams, who had been employed by defendant for about 6 years, testified that at these meetings Mr. and Mrs. Brodt agreed to sign a conditional sales contract before the furniture was delivered. The Brodts testified and denied that they had made any such statement.

The evidence is further to the effect that defendant refused to deliver any of the furniture until the Brodts would sign a conditional sales contract and this they refused to do. That Mr. Brodt said when the furniture that was then ready for delivery was delivered, he would give defendant a certified check for the \$300 as the contract of May 17 provided. The parties did not agree, the furniture was not delivered, and Mrs. Brodt filed her suit.

A witness called by plaintiffs gave testimony to the effect that there was no general custom in Chicago which required the purchaser to execute a conditional sales contract under facts substantially similar to the facts as disclosed by the evidence in the case at bar. Two witnesses called by defendant gave testimony to the contrary. The court in deciding the case said: "I will uphold the custom he is required to sign a conditional sales contract," and then entered the judgment as above stated. In this we think the court erred. Defendant's pleading set up that the contract between the parties was oral and that the Brodts agreed to execute a conditional sales contract. In these circumstances, obviously the question of custom was of no importance. If the Brodts had made an agreement to execute a conditional sales contract and it was a valid and binding obligation they would be required to carry it out regardless of custom. They denied that they had made such an oral agreement. The court did not pass on the question whether such an oral agreement had been



the increase in price, and whether defendant would investigate the Broths' financial standing to determine whether credit should be extended were discussed.

Mr. Lepley, who was president and treasurer of defendant corporation and Virginia Williams, who had been employed by defendant for about 8 years, testified that at these meetings Mr. and Mrs. Broth agreed to sign a conditional sales contract before the furniture was delivered. The Broths testified and denied that they had made any such statement.

The evidence is further to the effect that defendant refused to deliver any of the furniture until the Broths would sign a conditional sales contract and this they refused to do. That Mr. Broth said when the furniture that was then ready for delivery was delivered, he would give defendant a certified check for the \$300 as the contract of May 17 provided. The parties did not agree, the furniture was not delivered, and Mrs. Broth filed her suit. A witness called by plaintiff gave testimony to the effect

that there was no general custom in Chicago which required the purchaser to execute a conditional sales contract under facts substantially similar to the facts as disclosed by the evidence in the case at bar. Two witnesses called by defendant gave

testimony to the contrary. The court in deciding the case said: "I will uphold the custom he is required to sign a conditional sales contract," and then entered the judgment as above stated. In this we think the court erred. Defendant's pleading set up that the contract between the parties was oral and that the Broths agreed to execute a conditional sales contract. In these

circumstances, obviously the question of custom was of no importance. If the Broths had made an agreement to execute a conditional sales contract and it was a valid and binding obligation they would be required to carry it out regardless of custom. They denied that they had made such an oral agreement. The court did not pass on the question whether such an oral agreement had been



made but decided that he would uphold the custom which required the Brodts to sign a conditional sales contract. We think the evidence of custom was immaterial and inadmissible for another reason, namely, that it tended to vary the written contract which was in the form of a letter written by defendant to plaintiff on May 17, from which we have above quoted since the contract is clear and unambiguous. By it defendant was to sell the Brodts furniture for \$1,394, \$300 cash, \$300 on delivery of the furniture and \$50 a month thereafter. And the fact that the letter closed by stating, "Above is merely a hasty resume of price and general listing of articles. Selections not already made are to be made by you under our guidance," did not render the contract uncertain or ambiguous. There is no contention that any of the prices submitted are not the proper prices or that the furniture selected by Mrs. Brodt was in any way objected to, and the closing sentence merely shows she was to make further and additional selections of furniture which was never done because of the misunderstanding between the parties.

Defendant having failed to carry out the terms of its contract the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to enter judgment in favor of plaintiffs for \$300.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, J., and Niemeyer, J., concur.

made but decided that he would uphold the action which required the  
Hodges to sign a conditional sales contract. He stated the evidence  
of custom was immaterial and inadmissible for another reason, namely,  
that it tended to vary the written contract which was in the form  
of a letter written by defendant to plaintiff on May 14, 1900,  
which we have above quoted since the contract is clear and unambiguous.  
By its defendant was to sell the Hodges furniture for \$1,200, \$500 cash,  
\$300 on delivery of the furniture and \$400 a month thereafter. And  
the fact that the letter closed by stating, "above is merely a heads  
resume of price and general listing of articles. Selections not  
already made are to be made by you under our guidance," did not render  
the contract uncertain or ambiguous. There is no contention that any  
of the prices submitted are not the proper prices or that the  
furniture selected by Mrs. Hodges was in any way objected to, and the  
closing sentence merely shows she was to make further and additional  
selections of furniture which was never done because of the misunder-  
standing between the parties.  
Defendant having failed to carry out the terms of its contract  
the judgment of the Municipal Court of Chicago is reversed and the  
case remanded with directions to enter judgment in favor of  
plaintiff for \$300.

REVEREND AND HONORABLE WITH DUE TINGS.

WATSON, J., and NIEWEYER, J., concur.

42474

320 I.A. 339

ALBERTA GIBBS,  
Appellant,

v.

TESLAR GIBBS,  
Appellee.

APPEAL FROM

SUPERIOR COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Alberta Gibbs seeks to reverse an order entered March 12, 1942, dismissing her petition to vacate a decree of divorce entered June 10, 1940.

The record discloses that May 13, 1940, a complaint for divorce was filed by Alberta Gibbs against Teslar Gibbs, charging that defendant had deserted her without cause April 15, 1935. On the same day a summons was issued but the return states that it was "Not placed in hands of sheriff." May 16, three days after the complaint was filed, Teslar Gibbs filed his answer denying that he had wilfully deserted plaintiff without reasonable cause. June 5, following, Teslar Gibbs filed a cross complaint for divorce against Alberta Gibbs charging that she deserted him without cause April 15, 1935, and on the same day there appears in the record an answer filed by Alberta Gibbs denying the charge of desertion. The same day a stipulation was filed which recites that by agreement of parties by their attorneys, the cause is set down for hearing on the counter-complaint and answer on the Default Trial Calendar. On the same day, viz., June 5, the report of proceedings recites that the matter came on to be heard, both parties being represented by counsel; that evidence was heard on behalf of Teslar Gibbs in which he and Verna Hill gave testimony to the effect that Alberta Gibbs deserted Teslar April 5, 1935. The report of proceedings was filed June 10, 1940. On that day a decree of divorce was entered on the counter-complaint in which



320 I.A. 339

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY.

ALBERTA GIBBS,  
Appellant,

v.

TESLAR GIBBS,  
Appellee.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

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The record discloses that May 12, 1940, a complaint for divorce was filed by Alberta Gibbs against Teslar Gibbs, charging that defendant had deserted her without cause April 15, 1935. On the same day a summons was issued but the return states that it was "not placed in hands of sheriff." May 16, three days after the complaint was filed, Teslar Gibbs filed his answer denying that he had willfully deserted plaintiff without reasonable cause. June 5, following, Teslar Gibbs filed a cross complaint for divorce against Alberta Gibbs charging that she deserted him without cause April 15, 1935, and on the same day there appears in the record an answer filed by Alberta Gibbs denying the charge of desertion. The same day a stipulation was filed which recites that by agreement of parties by their attorneys, the cause is set down for hearing on the counter-complaint and answer on the Default Trial Calendar. On the same day, viz., June 5, the report of proceedings recites that the matter came on to be heard, both parties being represented by counsel; that evidence was heard on behalf of Teslar Gibbs in which he and Verma Hill gave testimony to the effect that Alberta Gibbs deserted Teslar April 5, 1935. The report of proceedings was filed June 10, 1940. On that day a decree of divorce was entered on the counter-complaint in which

2.

the court found the parties were married January 31, 1932, in Chicago, and that Alberta deserted Teslar April 5, 1935. Nothing further appears until about 20 months thereafter when on February 25, 1942, a notice was filed with the clerk of the Superior court by Ellis & Westbrooks, attorneys for Alberta Gibbs, addressed to the counsel who purported to represent plaintiff and defendant in the divorce proceeding, stating that they would ask the decree of divorce be vacated in accordance with the prayer of the petition then served on counsel.

In her petition to vacate the decree, Alberta Gibbs swears that she never at any time had any notice or knowledge of the institution or pendency of the divorce suit until January 5, 1942; that she had not employed the attorneys who purported to represent her in the divorce proceeding; that she had nothing to do with the case and knew nothing of it until 1942; that she had no notice of the cross-complaint filed against her; that she was never served with summons or notified in any way; that the return on the summons shows it was not placed in the hands of the sheriff for service; that she was living with defendant Teslar Gibbs as his wife at the time the suit was brought, May 13, 1940, and continued to live with him as his wife except for "possible interludes during which there were temporary separations" up to and including December 31, 1941; that the testimony taken on the hearing of the cross-complaint for divorce filed by Teslar Gibbs given by him and by ~~the other witness~~, Verna Hill, was knowingly false and therefore the decree was null and void. Other allegations are in the petition but we think it unnecessary to mention them further. The prayer was that the decree be set aside and vacated.

Upon the filing of the petition a rule was entered on Teslar Gibbs and attorneys Ellis and Taylor to answer the petition within 10 days and the matter be set down for hearing. March 11, Gibbs filed his answer denying most of the allegations and averring that



the court found the parties were married January 31, 1932, in Chicago, and that Alberta deserted Testar April 5, 1935. Nothing further appears until about 20 months thereafter when on February 25, 1942, a notice was filed with the clerk of the Superior Court by Ellis & Westbrook, attorneys for Alberta Gibbs, addressed to the counsel who purported to represent plaintiff and defendant in the divorce proceedings, stating that they would ask the decree of divorce be vacated in accordance with the prayer of the petition then served on counsel. In her petition to vacate the decree, Alberta Gibbs swears that she never at any time had any notice or knowledge of the institution or pendency of the divorce suit until January 5, 1942; that she had not employed the attorneys who purported to represent her in the divorce proceedings; that she had nothing to do with the case and knew nothing of it until 1942; that she had no notice of the cross-complaint filed against her; that she was never served with summons or notified in any way; that the return on the summons shows it was not placed in the hands of the sheriff for service; that she was living with defendant Testar Gibbs as his wife at the time the suit was brought, May 13, 1940, and continued to live with him as his wife except for "possible interludes during which there were temporary separations" up to and including December 31, 1941; that the testimony taken on the hearing of the cross-complaint for divorce filed by Testar Gibbs given by him and by the other witness, Verma Hill, was knowingly false and therefore the decree was null and void. Other allegations are in the petition but we think it unnecessary to mention them further. The prayer was that the decree be set aside and vacated. Upon the filing of the petition a rule was entered on Testar Gibbs and attorneys Ellis and Taylor to answer the petition within 10 days and the matter be set down for hearing. March 11, Gibbs filed his answer denying most of the allegations and averring that



3.

Alberta had full knowledge and notice of the divorce suit. On the hearing plaintiff gave testimony substantially sustaining the allegations of her petition and in addition testified that she talked to attorney Taylor before the suit was filed but told him she did not want a divorce. Attorney Taylor was called and testified that he first talked to Mrs. Gibbs May 6, 1940, at his office and that she asked him to file the divorce suit but that she did not have any money to pay, and that afterward the court costs were given to him by the attorney for Teslar Gibbs, and the suit was accordingly filed. That after the suit was filed and defendant had answered, the matter was continued a number of times because plaintiff could not get away from her work to appear in court and that she told him her husband could prove his counter-complaint if he wanted to. There is other evidence in the record. The court saw and heard the witnesses, found in favor of defendant, and upon a careful examination of all the evidence in the record we are unable to say that his finding is against the manifest weight of the evidence. In these circumstances we are not warranted in disturbing the finding of the chancellor.

Defendant further contends that the court was without power to entertain the petition because it had lost jurisdiction 30 days after the divorce decree was entered. There is no merit in this contention. If the suit was filed without plaintiff's authority, the court had no jurisdiction and any order or decree it might enter was void and might be attacked at any time collaterally or otherwise. Rybarczyk v. Weglarz, 204 Ill. App. 232; Sherman & Ellis, Inc. v. Journal of Commerce, 259 Ill. App. 453. Moreover defendant's contention cannot be entertained for the reason that both parties took part in the hearing and waived the question of the court's jurisdiction. Zandstra v. Zandstra, 226 Ill. App. 2 293, and cases there cited.

The order of the Superior court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

Matchett, J., and Niemeyer, J., concur.

... and notice of the divorce was given to the  
... and in relation testified that she failed to  
... after before the suit was filed but it is not  
... divorce. Attorney Taylor was called and testified that he  
... at his office and that she asked him to  
... the divorce suit but that she did not have any money to pay, and  
... that attorney the court costs were given to him by the attorney for  
... after Gibbs, and the suit was accordingly filed. After the suit  
... as filed and defendant had answered, the matter was continued a number  
... times because plaintiff could not get away from her work to appear  
... in court and that she told him her husband could prove his counter-  
... complaint if he wanted to. There is other evidence in the record. The  
... court saw and heard the witnesses, found in favor of defendant, and upon  
... careful examination of all the evidence in the record was unable  
... to say that his finding is against the manifest weight of the evidence.  
... in these circumstances we are not warranted in disturbing the finding  
... of the chancellor.

Defendant further contends that the court was without power to  
... maintain the petition because it had lost jurisdiction 30 days after the  
... divorce decree was entered. There is no merit in this contention. It  
... he suit was filed without plaintiff's authority, the court had no  
... jurisdiction and any order or decree it might enter was void and null.  
... attached at any time collectively or otherwise. Winters v. Winters,  
... 34 Ill. App. 2d 282; Shuman & Willis, Inc. v. Journal of Commerce, 258  
... Ill. App. 483. Moreover defendant's contention cannot be entertained  
... for the reason that both parties took part in the hearing and waived the  
... question of the court's jurisdiction. Landwehr v. Landwehr, 131 Ill. App. 3  
... 23, and cases there cited.

The order of the superior court of Cook County recorded from is  
... affirmed.  
... and Newton, J., concur.



320 I.A. 339<sup>2</sup>

42583

February Term, 1943.

JOSEPH K. GORMAN and JANE GORMAN,  
v. Appellants,  
GENERAL OUTDOOR ADVERTISING CO.,  
INC., a corporation, Appellee.

APPEAL FROM  
MUNICIPAL COURT,  
OF CHICAGO.

MR. PRESIDING JUSTICE D'CONNOR DELIVERED THE OPINION OF THE COURT.

September 24, 1941, plaintiffs brought an action against defendant to recover \$900 for rent for the year beginning July 6, 1941 and ending July 6, 1942, claiming that they were the owners of the property which was being occupied by defendant as a tenant at will. The defense interposed was that defendant was in possession of the premises under a valid written lease dated April 5, 1940, between William A. Snyder and defendant for a year, beginning May 7, 1940 and ending May 6, 1941, with a right in defendant to renew the lease and that it had exercised its option to renew the lease for one year. There was a trial before the court without a jury, a finding and judgment in defendant's favor and plaintiffs appeal.

The record discloses that William A. Snyder owned the premises in question, which were vacant, and located at the intersection of Elston avenue and N. Hamlin avenue, Chicago. June 7, 1939, Snyder and defendant entered into a written lease whereby the property was leased to defendant for a period beginning May 7, 1939, and ending May 6, 1940, at an annual rental of \$100, "with the right to the Lessee to extend this lease from year to year upon the same terms and conditions, the total of such extensions, however, not to exceed five years; such right of extension to be exercised by giving written notice \*\*\* to the Lessor \*\*\* at any time during the last sixty days of the year next preceding the



3201 A. 339

February Term, 1943.

43583

JOSEPH K. GORMAN and JIM GORMAN,  
Appellants,

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

GENERAL OUTDOOR ADVERTISING CO.,  
INC., a corporation,

Appellee.

MR. PRESIDING JUSTICE CONNOR DELIVERED THE OPINION OF THE COURT.  
September 24, 1941, plaintiffs brought an action against  
defendant to recover \$100 for rent for the year beginning July 6,  
1941 and ending July 6, 1942, claiming that they were the owners  
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sions, however, not to exceed five years; such right of extension  
to be exercised by giving written notice \*\*\* to the lessor \*\*\* at  
any time during the last sixty days of the year next preceding the

year for which such right of extension is exercised." The lessee was given the right to erect and maintain advertising sign structures and equipment on the premises. The lease further provided: "The Lessor reserves the right to terminate this lease by giving thirty days' notice in writing by registered mail to the Lessee, in the event that the Lessor sells or improves the demised premises by erecting a permanent, substantial building thereon." Apparently the terms of this lease were carried out by both parties and a similar lease was made on April 5, 1940, demising the premises for one year beginning May 7, 1940 and ending May 6, 1941, at an annual rental of \$85.

April 3, 1941, the lessor, Snyder, wrote defendant, tenant, a letter in which he said: "Will you please remove the Gen'l. Outdoor Advertising equipment from my lot on the Southwest corner of Elston Ave. and Hamlin. I do not wish to renew the contract this year on that lot." May 6, 1941, defendant sent Snyder a notice in writing in which it stated: "Please be informed that pursuant to the provisions of our lease with you of April 5th, 1940 covering the premises described \* \* \* Vacant premises at S. W. Cor. Elston & Hamlin Ave. Chicago, Ill.

"We hereby exercise the privilege and option to extend said lease for one year of the period therein provided, that is from May 6th, 1941 to May 6th, 1942, upon the terms and conditions in said lease contained."

On the following day, May 7, 1941, Snyder wrote defendant:

"Having contracted for the sale of the lot at S. W. corner of Elston & Hamlin Ave. Chicago, Ill. you were notified by me both by phone and in writing more than (30) days prior to May 6, 1941 that your lease on the above property would terminate on May 6, 1941



year for which such right of extension is exercised." The lessee was given the right to erect and maintain advertising sign structures and equipment on the premises. The lease further provided: "The lessor reserves the right to terminate this lease by giving thirty days' notice in writing by registered mail to the lessee, in the event that the lessor sells or improves the demised premises by erecting a permanent, substantial building thereon." Apparently the terms of this lease were carried out by both parties and a similar lease was made on April 5, 1940, demising the premises for one year beginning May 7, 1940 and ending May 6, 1941, at an annual rental of \$85.

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On the following day, May 7, 1941, Snyder wrote defendant: "Having contacted for the sale of the lot at S. W. corner of Elston & Hamilton Ave. Chicago, Ill. you were notified by me both by phone and in writing more than (30) days prior to May 6, 1941 that your lease on the above property would terminate on May 6, 1941



and I asked that your signs be removed.

"I am returning to you as cancelled what you saw fit to call a privilege and option, in as much as this lease has already terminated. It has come to my attention that as of May 6, 1941, your signs were still on the property. The buyer has requested me to notify you again to remove the signs immediately."

May 31, 1941, plaintiffs by their attorneys, wrote a letter to defendant in which it was stated: "You Are Hereby Notified that the undersigned are the owners of the premises formerly owned by William A. Snyder, which said premises are located at the southeast corner of Elston Avenue and N. Hamlin Avenue, Chicago. \*\*\*

"We Hereby Notify you that we elect to terminate as of July 6, 1941, your tenancy of said premises.

"We hereby offer to rent to you the above described premises for a period of one (1) year beginning July 6, 1941, and ending July 6, 1942, for a rental of Nine Hundred (\$900.00) Dollars per year, payable in advance," and that it would not be necessary for defendant to notify plaintiffs of its acceptance of the offer but the acceptance would be signified by allowing the signs to remain on the premises after July 6. May 7, defendant enclosed its check to Snyder for the annual rental of \$85, which Snyder May 13 returned.

Mrs. Snyder testified that she signed the name of her husband, William A. Snyder, to the lease of April 5, 1940; that when the lease was presented to her by a representative of defendant, she telephoned her husband who told her she might sign the lease for one year. Neither the representative of defendant, William N. Stanton, nor Mr. Snyder, nor the plaintiffs testified. Plaintiffs offered in evidence a warranty deed dated May 31, 1941,

Plaintiff offered in evidence a warranty deed dated May 31, 1941, William M. Stanton, nor Mr. Snyder, nor the plaintiffs testified.

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east corner of Elston Avenue and N. Hamilton Avenue, Chicago. \*\*\*

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whereby Mr. and Mrs. Snyder conveyed the premises in question to plaintiffs in consideration of \$3,500, and there is evidence to the effect that \$1,000 of the purchase price was paid in cash and a mortgage given for the balance.

Plaintiff, Jane Gorman, is the daughter of the Snyders and Joseph K. Gorman is her husband.

Plaintiffs' position, as stated by their counsel, is that "Snyder sold the property to plaintiff Gorman. Defendant was given three successive thirty-day notices to vacate in compliance with defendant's alleged lease. If one assume the supposed lease valid, still it has been terminated according to its terms." We think this contention cannot be sustained. The lease provided that it might be terminated by the lessor in case he sold the property and gave 30 days' notice in writing to the lessee. The letter of April 3, 1941, above quoted, was not in compliance with the terms of the lease. In that letter Snyder, the landlord, asked defendant to remove its advertising equipment because he did not wish to renew the contract. There was no mention of the fact that the property had been sold and there is no evidence in the record that it was sold until the date of the warranty deed, May 31, 1941. Defendant, by its letter of May 6, quoted above, advises Snyder that it had elected to exercise the option to extend the lease for one year. This was the day before the lease expired and came within the requirements of the lease. The lease having been renewed before the sale was made, plaintiffs were not entitled to recover the \$900 claimed by them. Obviously the letter of May 31, 1941, written by attorneys for plaintiffs to defendant, in which it was stated plaintiffs elected to terminate the lease as of July 6, 1941, and offering to rent it for \$900 for the year beginning July 6, 1941, was ineffective. Plaintiffs had no right to terminate the lease, that was the right



It had no right to terminate the lease, that was the right for it for \$200 for the year beginning July 8, 1941, was ineffective. It elected to terminate the lease as of July 8, 1941, and offering to for plaintiffs to defendant, in which it was stated plaintiffs by them. Obviously the letter of May 31, 1941, written by attorneys was made, plaintiffs were not entitled to recover the \$200 claimed. This was the day before the lease expired and came within the redemption had elected to exercise the option to extend the lease for one year. Defendant, by its letter of May 8, quoted above, advises Snyder that it was sold until the date of the warranty deed, May 31, 1941. The property had been sold and there is no evidence in the record that wish to renew the contract. There was no mention of the fact that defendant to remove its advertising equipment because he did not the terms of the lease. In that letter Snyder, the landlord, asked the letter of April 3, 1941, above quoted, was not in compliance with property and gave 30 days' notice in writing to the lessee. The that it might be terminated by the lessor in case he sold the lease valid, still it has been terminated according to its terms." compliance with defendant's alleged lease. If one assume the supposed was given three successive thirty-day notices to vacate in compliance with Snyder sold the property to Plaintiff Gorman. Defendant Plaintiff's position, as stated by their counsel, is and Joseph K. Gorman is her husband. Plaintiff, Jane Gorman, is the daughter of the Snyders a mortgage given for the balance. the effect that \$1,000 of the purchase price was paid in cash and plaintiffs in consideration of \$2,500, and there is evidence to whereby Mr. and Mrs. Snyder conveyed the premises in question to

of Snyder, the landlord, which he might exercise before the conveyance. In any event, the letter was too late since defendant, on May 6, 1941, had elected to renew the lease.

But plaintiffs further contend that the lease of April 5, 1940, was void under the Statute of Frauds because the name of the landlord, William A. Snyder, was signed by his wife and she had no authority in writing to do so. This contention cannot be sustained. Evans v. Schwartz, 211 Ill. App. 573; Bowman v. Powell, 127 Ill. App. 114; Cook v. Curry, 192 Ill. App. 182; McCormick v. Loomis, 165 Ill. App. 214.

In the Evans case we said: "The defendant urges that the lease is void under the Statute of Frauds, and that, where a tenant occupies premises and pays rent under a lease void under the Statute of Frauds, he is a tenant from month to month. Our courts have frequently held that it is not necessary that a lease be signed by both landlord and tenant in order to comply with the Statute of Frauds, but that a tenant's signature is sufficient to enable the landlord to hold him to the terms of the lease. In such a situation, the lessee, having signed the lease and taken possession of the premises under it, and paid rent to the landlord, is estopped to urge that it is within the Statute of Frauds, by reason of not having been signed by the lessor, or by some one on his behalf, with proper authority." Citing the Bowman, Cook and McCormick cases.

In the McCormick case, [165 Ill. App. 214] (opinion delivered by Mr. Justice Duncan, afterward a justice of our Supreme court), the landlord brought suit to recover rent and it was urged defendant had a defense, "because the contract or lease sued on does not bind him under the Statute of Frauds. The reasoning advanced his claim is, that said contract or leasing is for more than



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one year and, to be binding under the Statute of Frauds upon either party thereto, it should have been signed by both parties; that the signing of said contract by the defendant in error by her agent was not binding on her, because her agent had no written authority from her to sign said lease, and, therefore it was not binding upon plaintiff in error. We think that the acceptance of this contract and the collecting of rent thereon by the defendant in error, although the acceptance was not in writing, was sufficient to bind the plaintiff in error, the contract having been duly executed by him before such acceptance.

"It is now well settled by the weight of authority that the Statute of Frauds is satisfied if the contract for the sale lease of land for a longer term than one year, or the memorandum or note thereof, be signed by the party alone who is sought to be charged whether he be vendor or vendee."

Plaintiffs further contend that the lease does not cover the property in question for the reason that the property was described in the lease as being located at the southwest corner of Elston and Hamlin avenues, when as a matter of fact it is located at the southeast corner of the two streets. We think there is no merit in this contention. In the lease of June 7, 1939, and in the lease of April 5, 1940, which is involved in this suit, the property is described as being located at the southwest corner of the intersection, and a witness testified that he would describe the property as being located at the southwest corner of the two streets. Mr. Snyder, in his letter of April 3, 1941, to the defendant company, asked it to remove its equipment "from my lot on the Southwest corner of Elston Ave. and Hamlin." And in his letter of May 7, 1941, to defendant he said: "Having contracted for the sale of the lot at S. W. corner of Elston & Hamlin Ave." The property was similarly referred

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to by defendant in its communication of May 6, 1941, to Mr. Snyder. There is no doubt what property was intended and was actually demised under the lease. It was a vacant corner at the street intersections occupied by defendant with its bill-boards and for which it paid rent to Mr. Snyder, and neither party ought now be permitted to say that the lease did not cover the property involved.

But plaintiffs further contend that: "If all of the contentions made by defendant were correct, the Court should have rendered judgment for \$85 in favor of plaintiffs. The defendant admitted that it had paid nothing for the use of the premises." So far as the record discloses, this question was not presented to the trial court. There was no claim made for the \$85 in plaintiffs' statement of claim. The evidence showed that defendant sent Snyder a check for \$85 which Snyder returned. Of course defendant owes this amount.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and Niemeyer, J., concur.



to by defendant in its communication of May 6, 1941, to Mr. Snyder. There is no doubt what property was intended and was actually demised under the lease. It was a vacant corner at the street intersection occupied by defendant with its bill-boards and for which it paid rent to Mr. Snyder, and neither party ought now be permitted to say that the lease did not cover the property involved. But plaintiffs further contend that: "If all of the contentions made by defendant were correct, the Court should have rendered judgment for \$85 in favor of plaintiffs. The defendant admitted that it had paid nothing for the use of the premises." So far as the record discloses, this question was not presented to the trial court. There was no claim made for the \$85 in plaintiffs' statement of claim. The evidence showed that defendant sent Snyder a check for \$85 which Snyder returned. Of course defendant owes this amount.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and Niemeyer, J., concur.

42465

320 I.A. 340

LILLY JOSEPHS,

Appellee,

v.

ICIO JOSEPHS,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

May 3, 1941, Lilly Josephs filed her complaint under the statute against her husband, Icio. She alleged she had been a true and faithful wife; that he had deserted her and their children and failed to provide for them, although able to do so. He answered admitting the marriage and separation, but said it was for her fault. He filed a counterclaim charging cruelty on her part. She answered denying the charges. She prayed separate maintenance, he a decree of divorce. The court heard the evidence, entered a decree in favor of plaintiff, gave her the custody of the children, ordered defendant to pay her \$40 per month to support her and the children, and dismissed his counterclaim for want of equity. Defendant appeals.

Plaintiff has not filed any appearance. Defendant's brief argued the burden of proof was on plaintiff to show she was living separate and apart without fault. He cites cases such as Johnson v. Johnson, 125 Ill. 510, 514, and Augenstein v. Augenstein, 275 Ill. App. 18, which so hold. There is no doubt this is the rule applicable in the trial court as to issues of fact. It is just as clear that it is not the rule applicable to weighing the evidence on this appeal. The decisive question here is whether the findings of the trial court are clearly and manifestly against the weight of the evidence. All presumptions, so far as the facts are concerned, are in favor of the decree. It is quite true as a matter of law, as defendant contends, that if the separation was the fault of both parties the wife is not

3201A-440

LILLY JOHNSON, Plaintiff,  
 v.  
 LEO JOHNSON, Defendant.  
 Appellate Court,  
 Second Judicial District,  
 St. Paul, Minnesota.

MR. JUSTICE WATSON delivered the opinion of the court.

May 3, 1941, Lilly Johnson filed her complaint under the  
 statute against her husband, Leo. She alleged she had been a true  
 and faithful wife; that he had deserted her and their children and  
 failed to provide for them, although able to do so. He answered  
 admitting the marriage and separation, but said it was for her fault.  
 He filed a counterclaim charging cruelty on her part. She answered  
 denying the charges. On prayer separate maintenance, he a decree  
 of divorce. The court heard the evidence, entered a decree in favor  
 of plaintiff, gave her the custody of the children, ordered defendant  
 to pay her \$40 per month to support her and the children, and  
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 Plaintiff has not filed any appearance. Defendant's brief  
 argues the burden of proof was on plaintiff to show she was living  
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entitled to separate maintenance. The fault which will justify separation must be a fault from the viewpoint of the law, and the law does not require a wife to be a saint at the peril of releasing the husband from his duty to support her and their children. Defendant argues that, as a matter of law, a husband is not guilty of desertion if his departure was caused by the fault of the wife and her misconduct does not need to be so serious as to give grounds for a divorce in order to justify a separation. This is quite true. In the light of these rules we give consideration to the facts of the record.

Lilly and Icilo Josepha were married at Vienna, Austria, December 18, 1922. They continued to live together until December 31, 1940, when he left their home and has refused to return. During their married life she presented him with two children, a son, James David, who when this suit was begun was 15 years of age, and a daughter, Ellen, then 11 years of age. The husband, wife and children, up to the time of separation, lived in an apartment at 1411 Greenleaf Avenue in Chicago.

The records of cases of this kind are usually voluminous. That is not true of this one. The wife gave her testimony. She produced two other witnesses; one her brother, who had at different times lived in the home, another, a neighbor lady, who lived in the same apartment building. Their testimony tends to corroborate plaintiff and to show she is a good wife and mother, perhaps not perfect, but bringing her children up well. Defendant testified in his own behalf. He is not corroborated by any other, and his testimony falls short of establishing facts necessary to give him the right to a decree of divorce.

He testified that on October 10, 1933, she hit him in the face three or four times. He took his hat and left, and she followed him until he reached the "L" station, upbraiding him. The quarrel this time was about the question of income. On June 17, 1936, she reproached him for preferring the girl to the boy. He says this is not true, that

entitled to separate maintenance. The fault which will justify separation must be a fault from the viewpoint of the law, and the law does not require a wife to be a saint at the peril of releasing the husband from his duty to support her and their children. Defendant argues that, as a matter of law, a husband is not guilty of desertion if his departure was caused by the fault of the wife and her misconduct does not need to be so serious as to give grounds for a divorce in order to justify a separation. This is quite true. In the light of these rules we give consideration to the facts of the record.

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He testified that on October 10, 1935, she hit him in the face three or four times. He took his hat and left, and she followed him until he reached the "U" station, upbraiding him. The current time was about the question of income. On June 17, 1936, she reproached him for preferring the girl to the boy. He says this is not true, that



he loves the boy as much as the girl. He says he began to reason and "she hit me in the jaw with a fist". At a later time he discovered a loose tooth and had it removed. He does not say the hit made the dentistry necessary. The evidence showed without dispute (assuming these two incidents to be as he relates) there had been condonation. The trial judge suggested this and requested proof of more recent acts of cruelty be given. Apparently in desperation evidence was offered tending to show plaintiff had tried to poison defendant. Defendant said that on December 16, 1940, he was late coming home and that supper was served to him alone. He drank half a cup of tea and became ill. He told her she must have put something in it. She said this was not so, and that he must have eaten something before. Defendant says he had cramps that night and the next morning went to work and was sick. He could not know what the cause of it was, and he said he wanted to forget it because a similar thing happened years before and when he asked her about it she said, "Well, I had something put in that because I wanted your love to come back to me". Defendant is a member of the medical profession. He caused no analysis to be made. He continued to live with his wife. He admits, "I ridiculed the whole thing", and manifestly, it was a proper subject of ridicule which a more chivalrous husband would never have used in a law suit. Clearly, we cannot hold defendant is entitled to a divorce on this evidence. Nor can we find the faults of Mrs. Josephs such as require a reversal of the decree in her favor for separate maintenance. This family, evidently, during the first years of their married life lived in rather straightened financial circumstances. He has been a physician and surgeon since 1919 and has taught at the Northwestern University and the Y. M. C. A. in Chicago, specializing in psychology and psychiatry. He now has a position at the Kankakee State Hospital. Plaintiff testifies (he does not deny) she was influential in securing for him the position he holds. He says, "She is a lady of violent temper". Perhaps she is.

Their evidence as to what occurred on December 31, 1940, when the separation took place, indicates well their divergent viewpoints. It



he loves the boy as much as the girl. He says he began to reason and "she hit me in the jaw with a fist". At a later time he discovered a loose tooth and had it removed. He does not say to this case the identity necessary. The evidence showed without dispute (assuming these two incidents to be as he relates) there had been conversation. The trial judge suggested this and requested proof of more recent acts of cruelty be given. Apparently in domestic violence evidence was offered tending to show plaintiff had tried to poison defendant. Defendant said that on December 18, 1940, he was late coming home and that supper was served to him alone. He drank half a cup of tea and became ill. He told her she must have put something in it. She said this was not so, and that he must have eaten something before. Defendant says he had drunk that night and the next morning went to work and was sick. He could not know what the cause of it was, and he said he wanted to forget it because a similar thing happened years before and when he asked her about it she said, "Well, I had something put in that because I wanted your love to come back to me". Defendant is a member of the medical profession. He caused no analysis to be made. He continued to live with his wife. He admits, "I ridiculed the whole thing", and manifestly, it was a proper subject of ridicule which a more civilized husband would never have used in a law suit. Clearly, we cannot hold defendant is entitled to a divorce on this evidence. Nor can we find the fault of Mrs. Joseph such as require a reversal of the decree in her favor for separate maintenance. This family, evidently, during the first years of their married life lived in rather strained financial circumstances. He has been a physician and surgeon since 1910 and has taught at the Northwestern University and the U. S. A. in Chicago, specializing in psychology and psychiatry. He now has a position at the Lakeside State Hospital. Plaintiff testifies (he does not deny) she was ill content in securing for him the position he holds. He says, "She is a lady of violent temper". Perhaps she is. Their evidence as to what occurred on December 31, 1940, when the separation took place, indicates well their divergent viewpoints. It

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was the husband and father's birthday. For four or five months he had not taken any meals with his family, and Mrs. Josephs asked him to spend the evening with them, at least for supper. Jim, the son, was working and was late for the meal. Dr. Josephs became excited. She says, "He had already an appointment with a certain party he kept up previously for one year, he didn't want to be late". The doctor refused to wait for his son and departed. Mrs. Josephs says, "I said I will go with him wherever he goes. I am able to face the party whoever has the heart to take a father away continuously from his family for such a long time. In my hysteria I did follow him, which I regret, and he threatened that he will never come back and he did keep his threat." The doctor's description in part corroborates, in part denies Mrs. Josephs' narrative. He says it was his birthday, and some of his friends had invited him to celebrate it. "I promised to attend that at a certain place. When I came home I asked for early supper. The supper was ready. I asked why it was not served and when I said I was invited to a party, I was explained it would be late and I was not going. \*\*\* There was a slight altercation between us, and when I saw her temper rising ---- \*\*\* It was a verbal quarrel, it might have led to a physical quarrel \*\*\* In order to avoid that I went for my coat and hat and left. At the time she threatened to hit me. It was in the presence of the children. In order to prevent them seeing a scandal ---- she ran after me and pursued me all the way. I took refuge in the 'L' station." He says finally "she went home and I went to the Y. M. C. A. Hotel and took a room. Since that time she has never asked me to come back and live with her, she did not write me a letter."

She testifies she has asked him to return, and this whole record bears evidence of her desire for him to do so. Every page shows his will to desert her and her will that he should not do so. He has deserted her and his family without legal justification, whatever may be the infirmities of human nature which his wife possesses.



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The testimony she has asked him to return, and this whole record bears evidence of her desire for him to do so. Every page shows him will to desert her and her will that he should not do so. He has deserted her and his family without legal justification, whatever may be the infirmities of human nature which his life possesses.



5.

The trial judge saw the parties and heard the evidence. The issues on this appeal are not issues at law, which are well settled, but of fact, which must control. We cannot find the decree of the trial court as to the facts is clearly and manifestly against the weight of the evidence. On the contrary, we approve. It will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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affirmed.

REVEREND

O'Connor, P. J., and Niemeyer, J., concur.

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3201A.340<sup>2</sup>

WALTER SZYMCZAK, Individually and as  
Executor of the Estate of Stanley  
Szymczak and THEODORE SZYMCZAK,  
Appellees,

APPEAL FROM

v.

SUPERIOR COURT,

JEAN JAWOR, formerly Jean Szymczak,  
Appellant.

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by Jean Jawor, one of three children of Stanley Szymczak, his only heirs at law and next of kin, from a decree holding that the changes of beneficiary under certain insurance policies to herself were procured by fraud. Stanley Szymczak died testate July 23, 1941, at the age of 61 years. Anna, the mother and wife, pre-deceased him May 31, 1939. The will was executed May 23, 1941. It named Walter executor and directed the estate should be distributed equally among the three children.

The father in his lifetime owned the premises known as 2286 Blue Island Avenue, which were improved by a three story building, fitted for a store or tavern on the first floor and five 4-room apartments on the other floors. For many years prior to Stanley's death, the family lived in one of the flats. Both the father and the mother died there. Walter and Theodore the sons lived with the family there until they married and went to their own homes. Jean married but continued to live there after the death of her mother and cared for her father and made a home for him until he passed away. She continues to reside there since his death. After the death of the mother, Jean not only kept house for her father but secured employment near the home and earned from \$15 to \$17 per week. The father was a coal hiker. He earned from \$8 to \$28 per week. The children were all frequent visitors at the home. The family had a boarder, who lived in



STANLEY GAYNEK

WILLIAM GAYNEK, Individually and as  
Executor of the Estate of Stanley  
Gaynek and Theodor Gaynek,  
Appellants.

JEAN JAWOR, formerly Jean Gaynek,  
Appellant.

DOOR COUNTY.

MR. JUSTICE WATSON DELIVERED THE VERDICT OF THE COURT.

This appeal is by Jean Jawor, one of three children of Stanley Gaynek, his only heirs at law and next of kin, from a decree holding that the changes of beneficiary under certain insurance policies to herself were procured by fraud. Stanley Gaynek died testate July 23, 1941, at the age of 61 years. Anna, the mother and wife, pre-deceased him May 31, 1930. The will was executed May 23, 1941. It named Walter executor and directed the estate should be distributed equally among the three children.

The father in his lifetime owned the premises known as 2286 Pine Island Avenue, which were improved by a three story building, fitted for a store or tavern on the first floor and five 4-room apartments on the other floors. For many years prior to Stanley's death, the family lived in one of the flats. Both the father and the mother died there. Walter and Theodore the sons lived with the family there until they married and went to their own homes. Jean married but continued to live there after the death of her mother and cared for her father and made a home for him until he passed away. She continued to reside there since his death. After the death of the mother, Jean not only left house for her father but secured employment near the home and worked from 12 to 14 per week. The father was a coal hiker. He earned from \$3 to \$28 per week. The children were all present visitors at the home. The family had a housekeeper, who lived in

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the home for many years and paid \$10 a week, first to the mother and after her death to Jean. The children were all present when the father executed his will. For three weeks in 1940, the father received unemployment insurance from the state. Prior to his death he left \$100 with Jean, who afterwards gave from this \$50 to each of her brothers. The father was Polish, but the family was reared in the United States, and parents and children understood its customs and language. They were frugal and industrious. The exact amount of income derived from the building is not proved. The apartments were worth about \$12 per month. After the mother's death much of the business was attended to by Jean.

The father was interested in insurance investments. He took out his first policy with the Prudential Insurance Company in 1917. His last policy was taken out from the same company August 28, 1939. He turned over a part of his earnings to Jean. She helped collect the rents, turned in her own wages, and from this common fund (as during the lifetime of the mother) household expenses and insurance premiums were paid. The father received some insurance upon the death of the mother. It was placed in a safety deposit box at the Western American Bank, the box standing in the names of Jean and the father jointly. The box was taken June 3, 1939. The father drew \$50 from the box, got a check with it from the bank in that amount and sent it to Theodore. Each time the father visited the box, except on a single occasion, Walter and Jean were with him. The keys to this box were lost. October 23, 1940, the company drilled into the box and put a new lock on it and issued new keys. Jean went to the box shortly afterwards and says she found it empty. Walter, the executor, says he has not visited the box since his appointment. Jean says that after her marriage she and her husband rented a safety deposit box of their own, in which they kept money except that which was kept at home.

At the time of his death Stanley held six policies in the Prudential Insurance Company for the face amount of \$2,750; four policies in the Western and Southern Company for the total amount of \$2,850; and two policies in the Metropolitan for the total amount of \$350. Loans had

[illegible]



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been made by the father on the policies in the Western and Southern Company, which reduced the value of these policies to \$2,647.17. When taken out, three of these policies of the Western and Southern Company were payable to the executor of the father. The largest policy, however, of \$2,000 was payable to the mother, Anna. The beneficiary was changed on all the policies between September 5th and 7th, 1939, to Jean Jawor. The two policies with the Metropolitan Life Insurance Company contained a facility payment clause. The beneficiary in these policies was not changed. The policies in the Prudential, when taken out, were payable one to Jennie Szymczak, four to Anna Szymczak and one to the executor. The last one of these, issued August 28, 1939, was originally payable to Jennie Szymczak. The beneficiary in this policy was not changed. In all the others the beneficiary was changed to Jennie Szymczak, now Jean Jawor. After the death of her father, Jean proceeded to make proofs of loss, claiming these policies were payable to her.

August 4, 1941, Walter, personally and as executor, with Theodore filed their complaint in equity, averring that the changes of beneficiary to Jean had been obtained by fraud on the father. Their bill prayed an injunction, discovery and other relief. Jean answered, denying the fraud. The insurance companies, Prudential, Western and Southern and Metropolitan, were made parties to the original bill, filed an interpleader, paid the amounts due upon the respective policies into court and asked to be relieved from further litigation. Appropriate orders to that end were entered. The cause was referred to a master, who took the evidence, found for the plaintiffs and against Jean Jawor and recommended a decree setting aside the transactions by which the father made Jean the beneficiary of these policies and ordered the payment of the proceeds of the policies to the executor. The cause was heard on exceptions to the report of the master. These were overruled and a decree entered in conformity with his recommendations.

It is contended for reversal the decree appealed from is

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It is contended for reversal the decree appealed from is



contrary to the evidence, and this is the only point we find necessary to consider.

The fraud alleged in the bill is stated in Paragraph 10.

In substance it is that notwithstanding a sufficiency of funds in her possession to pay the premiums on the policies, Jean falsely and fraudulently, with intent to deceive Stanley Szymczak, represented to him that it was necessary for him to make a loan on the policies on his life to pay the current premiums, that he, placing trust and confidence in her and relying upon her truthfulness and representations to him, executed the instruments necessary to make her the beneficiary of the policies, at her instigation and request; that she secured his signature to the applications in the policies of insurance "and thereby uttered false and fraudulent requests to defendant insurance companies, to name her beneficiary under said policies; that each of said defendant insurance companies believing said applications to be voluntary and truthful, changed the beneficiaries in said policies, so that Jean Jawor, formerly Jean Szymczak, became the sole beneficiary thereunder".

The facts which we have heretofore recited are undisputed in the evidence. The appeal was not argued orally, but upon giving consideration to the case we requested oral arguments by the respective solicitors and they appeared before us. We particularly requested the solicitor for plaintiffs to point out in the record the evidence tending to sustain this crucial allegation of the bill. No such evidence appears in the record. Indeed, witnesses for plaintiffs gave testimony tending to disprove every charge of fraud made in the bill/

Mr. Turchan was the insurance salesman for the Western and Southern Insurance Company and collected the premiums at the home. He says that he was accustomed to collect the premium in the front room; that on one occasion Mrs. Jawor told him the father wanted to see him, and that he came out to the front room and the witness asked him what it was all about. Stanley Szymczak then told him



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he wanted to change the beneficiary. As to one of the policies the agent explained to the father there would be no need to change because under the facility payment clause any relative, by blood or marriage, could collect. Nevertheless, the father insisted that he make the beneficiary clear and change it. The witness says that the first time he was asked to make the change he did not have the necessary forms and promised that he would have them the next time, which he did. The witness said on cross-examination that he filled in the forms before the father signed them; that the father was present but the daughter was not, although she might have been there. He signed them all that day. This witness also collected insurance premiums on policies belonging to Theodore and Walter. He remembers the illness of the father and that he was sick for maybe three or four months. He talked with him sometime in April or May before his death.

Mr. Golasky was the agent of the Prudential Insurance Company. He says that Jean (or Jennie) the daughter, was never present when Mr. Szymczak talked to him about the policies, and he never knew whether anything had been said between her and her father about the insurance. He says the father had the policy before him when he made the application for the change of beneficiary. The witness picked up the policy to send it in to the home office when the change in beneficiary was made, and upon its return from the home office he delivered it to the insured and got his receipt for it. He positively states that on every occasion when he served Mr. Szymczak in changing the beneficiary on any of the policies there was no other person except Mr. Szymczak and himself present.

Each of the Metropolitan policies contained a facility of payment clause, which authorized payment of the proceeds of each either to Jennie Szymczak or the executor of the assured's estate.

We hold that the fraud alleged in the bill is disproved by the evidence of these witnesses, testifying in behalf of the plaintiffs. It is, of course, elementary that the burden is on the plaintiff who alleges fraud to prove it, and it follows that the court erred



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Each of the metropolitan policies contained a facility of payment clause, which authorized payment of the proceeds of each either to Jennie Szymozak or the executor of the insured's estate. He holds that he found listed in the bill is disapproved by the evidence of these witnesses, testifying in behalf of the plaintiff. It is, of course, elementary that the burden is on the plaintiff to allege and to prove it, and it follows that the court erred



6.

in finding that plaintiff's bill had been sustained and in ordering distribution of the proceeds of these policies to be made to the executor. Schiavone v. Ashton, 332 Ill. 484; New York Life Ins. Co. v. Andrews, 167 Ill. App. 182.

The decree will be reversed and the cause remanded with directions to dismiss the complaint, to distribute the proceeds of these insurance policies to Jean Jawor under the respective bills of interpleader filed by the insurance companies, and to tax costs against the complainants in conformity with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Niemeyer, J., concur.

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REVEREND AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Wisniewski, J., concur.

JOSEPH WAGNER, doing business as  
WAGNER DAIRY PRODUCTS,  
Appellant,

v.

MILK WAGON DRIVERS' UNION LOCAL  
753, et al.,  
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree reforming a contract with defendant union as to the date it became effective, directing an accounting as to wages and commissions due six union employees of plaintiff and denying an injunction restraining the picketing of stores purchasing dairy products from plaintiff.

Plaintiff buys milk from farmers and producers and sells much of his product through drivers to stores and milk stations, who resell to consumers who call for their purchases. The defendants are the Milk Wagon Drivers' Union and certain officers, individually and as representatives of the members of the union. No employee whose wages and commissions are involved is a party to the suit except as a member of the union represented by its officers.

Plaintiff and the union entered into a contract about May 1, 1940, which expired May 1, 1941 pursuant to notice of termination given by plaintiff. A second contract purporting to take effect May 1, 1941 was prepared and signed by the union and sent to plaintiff for signature about August 29, 1941. Plaintiff changed the effective date of the contract to August 29, 1941, signed and returned it to the union. The union refused to accept the contract as changed and sent a new contract, effective May 1, 1941, to plaintiff, who did not sign and return it.

Each of these contracts provides that no member of the union will be asked to make any verbal or written contracts which shall



JOSEPH WAGNER, doing business as  
WAGNER DAIRY PRODUCTS,  
Appellant,

v.

MILK WAGON DRIVERS' UNION LOCAL  
753, et al.,  
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APPEAL FROM

SUPERIOR COURT,

COON COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

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Plaintiff and the union entered into a contract about May 1, 1940, which expired May 1, 1941 pursuant to notice of termination given by plaintiff. A second contract purporting to take effect May 1, 1941 was prepared and signed by the union and sent to plaintiff for signature about August 29, 1941. Plaintiff changed the effective date of the contract to August 29, 1941, signed and returned it to the union. The union refused to accept the contract as changed and sent a new contract, effective May 1, 1941, to plaintiff, who did not sign and return it.

Each of these contracts provides that no member of the union will be asked to make any verbal or written contracts which shall

conflict with the contracts between the plaintiff and the union, that all existing agreements in conflict with said contracts are null and void and that in event of a dispute as to commissions and wages the employer agrees to furnish within a reasonable time, reports, load sheets and any records applying to wages and commissions necessary to determine whether an employee received the wages and commissions to which he was entitled.

The union contending that plaintiff had not paid the union scale of wages and commissions, plaintiff on August 28, 1941 deposited \$4,000 with the union and took a receipt of that date reciting a legitimate dispute as to the payment of contract wages, an admission by plaintiff that certain moneys were due to his driver employees, an agreement between the parties that the \$4,000 is given to the union as part payment of wages due said employees, that the balance is to be payable to the union after an audit to be made by September 5, 1941, and that commissions be figured as of July 15, 1941.

A further dispute having arisen as to the deposit of an additional \$3,000 demanded by defendants, and plaintiff having refused to make the deposit, the union began picketing stores buying from plaintiff. Plaintiff instituted this suit and in his complaint expressed a desire to pay to his employees any sum of money due them, alleged the picketing of the stores of his customers by the union and prayed for an accounting and for an injunction restraining picketing. Defendants' answer, stripped of unnecessary and irrelevant matter, alleges a dispute as to wages and commissions, a deposit by plaintiff of \$4,000, a partial audit of plaintiff's books from which an estimated amount of \$7,800 due employees was arrived at, the arbitrary refusal of plaintiff to permit completion of the audit, his refusal to produce the necessary books and to cooperate in the investigation, the refusal of plaintiff to deposit an additional \$3,000, the resumption of picketing, and denies any threats, intimidation or violence in connection with the picketing.



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to permit completion of the audit, his refusal to produce the necessary  
books and to cooperate in the investigation, the refusal of plaintiff  
to deposit an additional \$3,000, the resumption of picketing, and  
causes any threats, intimidation or violence in connection with the  
picketing.



Defendants also filed a counterclaim alleging that the contract of May 1, 1940 remained in force and effect until August 29, 1941, when another contract was entered into which is still in force; that plaintiff violated the contracts and has cheated and defrauded his drivers out of approximately \$40,000. Defendants prayed for an injunction, not now involved herein, and for an accounting as to the sum or sums of money due to the employees. Plaintiff in his answer to the counterclaim again asserted his readiness to pay his employees any sum due them and says that in his complaint he asked for said accounting and stands ready and willing to comply with the prayer of his complaint and has no objection to an accounting being taken, and that any money owing should be paid out of the \$4,000 deposited with the union.

After Haggerty, the secretary-treasurer of the union, had testified that the union had not accepted the contract signed by plaintiff and dated August 29, 1941, plaintiff amended his complaint and his answer to the counterclaim by alleging that the union did not accept the last mentioned contract and that no contract between plaintiff and the union was in effect after May 1, 1941. Plaintiff also amended his complaint by alleging that in January 1941 the union contended that certain moneys were due and owing by the plaintiff; that plaintiff paid \$718 upon agreement that all claims of the union would be satisfied by the payment of that sum. Although ruled to answer the complaint as amended instantler, no further pleadings were filed by defendants.

On appeal plaintiff contends that the court erred in denying an injunction and in reforming the contract of August 29, 1941; that there was no contract with the union for the year 1941; that the union cannot sue on behalf of its members; that the employees named are not members of the union; that the employees were hired at an agreed price and worked without objection and cannot claim additional compensation; that by payment of \$718 in January 1941, plaintiff settled all claims of the union existing at that time, that the

Defendants also filed a counterclaim alleging that the contract of May 1, 1940 remained in force and effect until August 29, 1941, when another contract was entered into which is still in force; that plaintiff violated the contract and was cheated and defrauded in drivers out of approximately \$40,000. Defendants prayed for an injunction, not now involved herein, and for an accounting as to the sum or sums of money due to the employees. Plaintiff in his answer to the counterclaim again asserted his readiness to pay his employees any sum due them and says that in his complaint he asked for a full accounting and stands ready and willing to comply with the prayer of his complaint and has no objection to an accounting being taken, and that any money owing should be paid out of the \$4,000 deposited with the union.

After Haggerty, the secretary-treasurer of the union, had testified that the union had not accepted the contract signed by plaintiff and dated August 29, 1941, plaintiff amended his complaint and his answer to the counterclaim by alleging that the union did not accept the last mentioned contract and that no contract between plaintiff and the union was in effect after May 1, 1941. Plaintiff also amended his complaint by alleging that in January 1941 the union contended that certain moneys were due and owing by the plaintiff; that plaintiff paid \$18 upon a payment that all claims of the union would be satisfied by the payment of that sum. Although failed to answer the complaint as amended instantaneously, no further pleadings were filed by defendants.

On appeal plaintiff contends that the court erred in denying an injunction and in refusing the contract of August 29, 1941; that there was no contract with the union for the year 1941; that the union cannot sue on behalf of its members; that the employees named are not members of the union; that the employees were hired at an agreed price and worked without objection and cannot claim additional compensation; that by payment of \$18 in January 1941, plaintiff settled all claims of the union existing at that time, that the



4.

master misconstrued the issues before him, admitted incompetent and irrelevant testimony and made findings not involved on the reference to him, and that his fees are exorbitant.

The record shows conclusively and the parties agree that there was a controversy as to whether or not the six men named had received the union scale of wages and commissions; that plaintiff deposited with the union \$4,000 to be used in paying such sums as might be found due; that after a trial audit covering a period from January 1 through July 15, 1941 the union demanded the deposit of \$3,000 additional, and upon plaintiff's refusal commenced to picket stores buying from plaintiff. These pickets carried banners bearing the legend that the store picketed sells dairy products processed by plaintiff, who is unfair to the union. There is no evidence of any threats, except to picket during the controversy with plaintiff so long as the store buys his products, and no evidence of any intimidation or violence. The picketing was lawful and the injunction was properly denied. Ellingsen v. Milk Wagon Drivers' Union, 377 Ill. 76; Lawrence Ave. Bldg. Corp. v. Van Heck, 377 Ill. 37.

The decree reformed the contract with the union signed by plaintiff August 29, 1941 by changing the effective date from the date of plaintiff's signature to May 1, 1941. There is neither allegation nor proof to support this part of the decree. In the answer to the complaint and in the counterclaim defendants alleged that the contract of May 1, 1940 continued in effect until August 29, 1941, when another contract which is still in effect was entered into. The answer and counterclaim were sworn to by Haggerty, secretary-treasurer, and never amended. The evidence shows without contradiction that plaintiff terminated the first contract May 1, 1941 by notice pursuant to the contract. Haggerty then testified that the second contract was not accepted by the union because its effective date had been changed without the union's consent; that a new contract effective May 1, 1941 was sent to plaintiff for execution but that plaintiff did not sign and return it. He claims that Mrs. Pomey, a daughter of plaintiff, told him that the change was made without authority by Mrs. Braden, another daughter of plaintiff, Mrs. Pomey denies making this statement. But if we



...misconstrued the issues before him, admitted incoherence and irrelevant testimony and made findings not involved on the reference to him, and that his fees are exorbitant.

The record shows conclusively, and the parties agree that there was a controversy as to whether or not the six men named had received

the union scale of wages and commissions; that plaintiff deposited with the union \$4,000 to be used in paying such sums as might be found due; that after a final audit covering a period from January 1 through July 15, 1941 the union demanded the deposit of \$3,000 additional, and upon plaintiff's refusal commenced to picket stores buying from plaintiff.

These pickets carried banners bearing the legend that the store picketed sells dairy products processed by plaintiff, who is unfair to the union. There is no evidence of any threats, except to picket during the

controversy with plaintiff no longer as the store buys his products, and no evidence of any intimidation or violence. The picketing was lawful and the injunction was properly denied. Williamson v. Milk Wagon Drivers' Union, 377 Ill. 76; Lawrence Ave. Bldg. Corp. v. Van Hook, 377 Ill. 37.

The decree reformed the contract with the union signed by plaintiff August 26, 1941 by changing the effective date from the date of plaintiff's signature to May 1, 1941. There is neither allegation nor proof to

support this part of the decree. In the answer to the complaint and in the counterclaim defendants alleged that the contract of May 1, 1940 continued in effect until August 26, 1941, when another contract which was still in effect was entered into. The answer and counterclaim

were sworn to by Haggerty, secretary-treasurer, and never amended. The evidence shows without contradiction that plaintiff terminated the first contract May 1, 1941 by notice pursuant to the contract. Haggerty then testified that the second contract was not accepted by the union

because its effective date had been changed without the union's consent; that a new contract effective May 1, 1941 was sent to plaintiff for execution but that plaintiff did not sign and return it. He

claims that Mrs. Pomey, a daughter of plaintiff, told him that the change was made without authority by Mrs. Braden, another daughter

accept the testimony of Haggerty, there is nothing in the record to warrant the assumption that Mrs. Pomey had greater authority than her sister to bind her father. The record fails to show the mutual mistake<sup>or</sup> mistake on one side and fraud on the other which is the basis of equity jurisdiction for the reformation of written instruments. Harley v. Magnolia Petroleum Co., 378 Ill. 19. Furthermore, Haggerty's testimony, contradicted by his sworn statements in the answer and counterclaim and by the testimony of Mrs. Pomey, is not evidence of that clear and convincing character required before equity will grant such relief, Ruffner v. McDonnell, 17 Ill. 212; 45 Am Jur., Reformation of Instruments, sec. 117.

Plaintiff by amendment to his pleadings adopted the nonacceptance of the contract of August 29, 1941 by the union. This leaves the rights of the parties on the accounting to be determined by the contract of May 1, 1940 and the agreement made when the \$4,000 was deposited with the union. Under these agreements the accounting should be restricted to the time worked by each of the men from May 1, 1940 to July 15, 1941, and the union scale of wages and commissions during that period should be the standard of compensation.

Plaintiff started this litigation; he chose the form of action and designated the defendants thereto; he alleges in the complaint that each of the six employees named is a member of the union; in answering the counterclaim he admits that these men were members of the union but claims to be uninformed as to whether or not they were then in good standing. The complaint and answer to the counterclaim are based upon the theory that the men are union men, entitled to union wages and commissions, and that since August 1941 plaintiff "has been endeavoring to ascertain whether or not a mistake has been made and whether or not he is indebted to any of his employees or former employees." Plaintiff named the union and its officers as defendants, omitting the employees whose compensation is involved, and when the counterclaim was filed assented to the accounting prayed for without questioning the capacity or authority of the



accept the testimony of Haggerty, there is nothing in the record to  
warrant the assumption that Mrs. Haggerty had greater authority than her  
husband to bind her father. The record fails to show the mutual mistake  
mistake on one side and stand on the other which is the basis of equity  
jurisdiction for the relaxation of written instrument. Wulfer v.  
Anglia Petroleum Co., 378 Ill. 12. Furthermore, Haggerty's testimony  
contradicted by his own statement in the answer and counterclaim  
and by the testimony of Mrs. Haggerty, is not evidence of just claim and  
convincing the court required before equity will grant such relief.  
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union to sue. In Franklin Union v. The People, 220 Ill. 355, the court had under consideration the question of the right of a voluntary association made up of various printing firms to bring an action, and (p. 364) said: "The want of capacity to file a bill in chancery by an unincorporated body - a voluntary association - must be taken advantage of by demurrer if the lack of capacity to sue appears upon the face of the bill, and if it does not appear upon the face of the bill the question must be raised by plea, otherwise the want of capacity of such association to sue will be waived and the question of its capacity to sue cannot be raised in this court upon appeal for the first time." Furthermore, plaintiff having brought suit against the union and its officers for an accounting as to the sums, if any, owed the employees, is now estopped to deny the capacity or authority of the union to proceed with the accounting for the benefit of its members. Seven Lakes R. Co. v. New Loveland & G. I. & L. Co., 40 Colo. 382, 390-1; Fisher v. Shropshire, 147 U. S. 133, 145. The same principle estops plaintiff from now raising the question of the membership of said employees in the union and their rights to recover the difference, if any, between the union scale and the amounts actually paid the men. As heretofore stated, plaintiff's pleadings admit the membership of the employees in the union. The complaint charges that the deposit of the \$4,000 was made in compliance with an agreement whereby the amounts, if any, owing to the employees were to be ascertained or reckoned according to the schedule of wages set forth in the contract of the union for occupations similar to those of the six employees. Plaintiff cannot now change his position.

By amendment to the complaint plaintiff claimed that by the payment of \$718 in January 1941 he settled all claims of the union existing at that time. The decree finds that the payment of that sum was not an adjustment of the amount due from plaintiff to the employees under the union contract. The record supports the finding. There is nothing to indicate that the alleged failure of plaintiff to pay the union scale was considered by any of the parties at that time. The

union to sue. In Franklin Union v. The People, 250 Ill. 322, the court had under consideration the question of the right of a voluntary association made up of various printing firms to bring an action, and (p. 324) said: "The want of capacity to file a bill in chancery by an unincorporated body - a voluntary association - must be taken advantage of by demurrer if the lack of capacity to sue appears upon the face of the bill, and if it does not appear upon the face of the bill the question must be raised by plea, otherwise the want of capacity of such association to sue will be waived and the question of its capacity to sue cannot be raised in this court upon appeal for the first time." Furthermore, plaintiff having brought suit against the union and its officers for an accounting as to the sums, if any, owed the employees, is now estopped to deny the capacity or authority of the union to proceed with the accounting for the benefit of its members. Seven Lakes R. Co. v. New Loveland & G. I. & L. Co., 40 Colo. 322, 330-1; Fisher v. Shropshire, 147 U. S. 133, 145. The same principle estops plaintiff from now raising the question of the membership of said employees in the union and their right to recover the difference, if any, between the union scale and the amounts actually paid the men. As heretofore stated, plaintiff's pleadings admit the membership of the employees in the union. The complaint charges that the deposit of the \$4,000 was made in compliance with an agreement whereby the amount, if any, owing to the employees were to be ascertained or reckoned according to the schedule of wages set forth in the contract of the union for occupations similar to those of the six employees. Plaintiff cannot now change his position. By amendment to the complaint plaintiff claimed that by the payment of \$718 in January 1941 he settled all claims of the union existing at that time. The decree finds that the payment of that sum was not an adjustment of the amount due from plaintiff to the employees under the union contract. The record supports the finding. There is nothing to indicate that the alleged failure of plaintiff to pay the union scale was agreed by any of the parties at that time. The



union was objecting that plaintiff was employing non-union men or union men in arrears in dues and assessments, and the witnesses for defendants and plaintiff testified that the money was paid for union initiation fees, dues and assessments of plaintiff's employees. It was applied for that purpose. Haggerty, the secretary-treasurer, testified without contradiction that during the August 1941 negotiations Mrs. Braden said that she wanted to set off the money advanced for initiation fees, dues and assessments against any money due the men, and that he, Haggerty, said they were in agreement on allowing that.

The last point for consideration is plaintiff's objection that the master received evidence relating to and made findings as to irrelevant and immaterial matters and that his fees are exorbitant. Plaintiff sought an injunction and an accounting. The right to the injunction was contested. Defendant by counterclaim sought an accounting as to the same subject matter involved in the complaint and plaintiff concurred in the prayer of defendants. The parties agreeing that an accounting be had, plaintiff rightly contends that the established practice limited the issue on the accounting before the master to a determination of the basis of an account. Ligare v. Peacock, 109 Ill. 94, 97; Rhodes v. Ashurst, 176 Ill. 351, 353. The master recognized this rule in that he did not attempt to state an account. However, he admitted evidence and made findings as to a former chancery suit by plaintiff and one of his customers against the defendants, as to plaintiff's alleged coercion of the employees whose compensation is involved herein and subornation of perjury of said employees as witnesses in the former proceeding, and as to the alleged insufficiency and inaccuracy of plaintiff's books and records as to wages and commissions. Plaintiff insists this was improper.

May 3, 1941, immediately after the termination of the 1940 contract between plaintiff and the union, plaintiff and one of his customers filed a complaint against the defendants herein, seeking an injunction against picketing. A hearing was had on reference to a master and the injunction was denied and the complaint dismissed by the



union was objecting that plaintiff was employing non-union men or union men in arrears in dues and assessments, and the witnesses for defendants and plaintiff testified that the money was paid for union initiation fees, dues and assessments of plaintiff's employees. It was applied for that purpose. Haggerty, the secretary-treasurer, testified without contradiction that during the August 1941 negotiations Mrs. Braden said that she wanted to set off the money advanced for initiation fees, dues and assessments against any money due the men, and that he, Haggerty, said they were in agreement on allowing that. The last point for consideration is plaintiff's objection that the master received evidence relating to and made findings as to irrelevant and immaterial matters and that his fees are exorbitant. Plaintiff sought an injunction and an accounting. The right to the injunction was contested. Defendant by counterclaim sought an accounting as to the same subject matter involved in the complaint and plaintiff consented in the prayer of defendants. The parties agreeing that an accounting be had, plaintiff rightly contends that the established practice limited the issue on the accounting before the master to a determination of the basis of an account. Litke v. Perceak, 109 Ill. 94, 97; Rhodes v. Ahnert, 178 Ill. 351, 353. The master recognized this rule in that he did not attempt to state an account. However, he admitted evidence and made findings as to a former conspiracy suit by plaintiff and one of his customers against the defendants, as to plaintiff's alleged coercion of the employees whose compensation is involved herein and subornation of perjury of said employees as witnesses in the former proceeding, and as to the alleged inefficiency and inconsistency of plaintiff's books and records as to wages and commissions. Plaintiff insists this was improper. May 3, 1941, immediately after the termination of the 1940 contract between plaintiff and the union, plaintiff and one of his customers filed a complaint against the defendants herein, seeking an injunction against picketing. A hearing was had on reference to a master and the injunction was denied and the complaint dismissed by the

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court shortly before the negotiations between plaintiff and the union, resulting in the deposit of the \$4,000 on August 28, 1941. The present action is based entirely on matters arising subsequent to the dismissal of the former proceedings. The former proceeding is not evidence of any question involved in the present action. Nevertheless the master received in evidence certified copies of the pleadings, the master's report and the decree, and makes findings as to the various steps in the former proceedings. He also received evidence as to the alleged suborning by an agent of plaintiff of certain employees to testify falsely in the former proceeding, and in effect finds plaintiff's agent guilty of ~~subornation~~ of perjury. This evidence and finding is without relevancy and materiality in the present state of this suit. They can only become competent on the stating of the account if the employees testify to compensation received and an attempt is made to impeach them by their former testimony. The injection of this issue into the case besmirches an agent of the plaintiff through the testimony of confessed perjurers when the agent, not being a party to the action, was without opportunity to defend himself. In justice to this agent it must be stated that the record shows he was acquitted of the offense on a trial in the Criminal court.

Furthermore, the master received much evidence for the purpose of showing, and made findings, that the books and records of plaintiff were inaccurate and insufficient to show the compensation due plaintiff's employees. These matters, like <sup>the</sup> alleged influencing of the employee witnesses, were plainly matters for the consideration and determination of the master to whom the cause was to be thereafter referred to state the account, and their inclusion in the master's report and the decree are improper. Having received this evidence, material only on the taking of the account, the account could have been concluded with little additional evidence and a great saving of costs and time to both parties.

The master appends to his report a certificate of services and fees, charging \$829.05 for taking testimony and \$600 for services



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The master appends to his report a certificate of services and fees, charging .05 for taking testimony and \$600 for services



in determining the issues raised by the pleadings, examination of the testimony, preparing findings of fact and conclusions of law and time spent at hearings and arguments, in the aggregate amounting to 146 1/2 hours. This means 29 days at five hours each. The court did not fix the fees of the master but referred the assessment of the costs of the suit, including the master's fees, back to the master whose fees were involved to make his findings on the same and report them to the court. Technically the question of the proper fees of the master is not before us. However, plaintiff argues the question without objection, and we have examined it and will express our views in the hope that a further appeal on that question will be avoided.

The factual controversies in this case are few and simple. In the matter of the picketing and the conduct of the union officials and members, concerning which marked conflict in the testimony would generally be expected, the record is remarkably free of dispute. The witnesses of the plaintiff did not testify to conduct, threats, intimidation or violence which would render the picketing illegal. The dispute in the record as to what the pickets or union representatives said or did is insignificant. Likewise in respect to the basis of the accounting. We have already commented on the question as to whether there was a contract between the union and the plaintiff after May 1, 1941. There was one more dispute. Plaintiff argues that the drivers were non-commission wholesale men- not commission wholesale route men. Officials of the union testify that the men are classed as commission wholesale route men and describe the work of such men. Plaintiff's witnesses testify to the payment of commissions to the men, and the audit introduced into evidence by plaintiff shows commissions due and amounts paid on account of same. Testimony covering more than 2,000 pages was taken, a great portion of which was given to evidence relating to immaterial matters and to exceedingly long cross-examinations.

The master should have itemized his services. Litwin v. Litwin, 375 Ill. 90; Neipp v. Toolen, 313 Ill. App. 28. If the time spent at hearings and arguments includes time consumed in taking the testimony,

in determining the issues raised by the pleadings, examination of the testimony, preparing findings of fact and conclusions of law and time spent at hearings and arguments, in the aggregate amounting to 14 1/2 hours. This means 29 days at five hours each. The court did not fix the fees of the master but referred the assessment of the costs of the suit, including the master's fees, back to the master whose fees were involved to make his findings on the same and report them to the court. Technically the question of the proper fees of the master is not before us. However, plaintiff argues the question without objection, and we have examined it and will express our views in the hope that a further appeal on that question will be avoided.

The factual controversies in this case are few and simple. In the matter of the picketing and the conduct of the union officials and members, concerning which marked conflict in the testimony would generally be expected, the record is remarkably free of dispute. The statements of the plaintiff did not testify to conduct, threats, intimidation or violence which would render the picketing illegal. The dispute in the record as to what the pickets or union representatives said or did is insignificant. Likewise in respect to the basis of the accounting. We have already commented on the question as to whether there was a contract between the union and the plaintiff after May 1, 1941. There was one more dispute. Plaintiff argues that the drivers were non-commission wholesale men - not commission wholesale route men. Officials of the union testify that the men are classed as commission wholesale route men and describe the work of such men. Plaintiff's witnesses testify to the payment of commissions to the men, and the audit introduced into evidence by plaintiff shows commissions due and amounts paid on account of same. Testimony covering more than \$2,000 was taken, a great portion of which was given to evidence relating to immaterial matters and to exceedingly long cross-examinations.

The master should have itemized his services. Litwin v. Litwin, 375 Ill. 20; Neup v. Toolen, 313 Ill. App. 28. If the time spent at hearings and arguments includes time consumed in taking the testimony,



there is<sup>a</sup> double assessment of costs which is unwarranted. If the charge of 29 days is exclusive of the time spent in taking the testimony it is difficult to see how so much time could have been spent on the case. It seems that four or five days would be more than ample for a proper consideration of the case, listening to arguments, preparing a report, etc. Gottschalk v. Noyes, 225 Ill. 94; Litwin v. Litwin, 375 Ill. 90. The fees of the master should be adjusted to a reasonable basis and taxed equally against plaintiff and defendants, even though defendants have won on the matter of the injunction, because both parties asked for an accounting and defendants more than plaintiff are responsible for injecting into the record much unnecessary and irrelevant testimony, thereby greatly increasing the costs before the master.

The decree of the Superior court is reversed and the cause remanded with directions to proceed in accordance with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Matchett, J., concur.



there is a double assessment of costs which is unwarranted. It is

charge of 25 days is exclusive of the time spent in taking the

testimony it is difficult to see how so much time could have been

spent on the case. It seems that four or five days would be more

than ample for a proper consideration of the case, listening to

arguments, preparing a report, etc. Gottschalk v. Novak, 225 Ill. 34;

Litwin v. Litwin, 378 Ill. 20. The fees of the master should be

adjusted to a reasonable basis and taxed equally against plaintiff and

defendants, even though defendants have won on the matter of the

injunctive, because both parties called for an accounting and defendants

more than plaintiff are responsible for injecting into the record

much unnecessary and irrelevant testimony, thereby greatly increasing

the costs before the master.

The decree of the Superior Court is reversed and the cause

remanded with directions to proceed in accordance with the views expressed

in this opinion.

REVEREND AND REMANDED WITH DIRECTIONS.

(Conover, P. J., and Matheis, J., concur.)

42483

220 I.A. 341<sup>2</sup>

VIDA BEST,

Appellant,

v.

APPEAL FROM

MID-WEST CONSTRUCTION CORPORATION,  
Appellee.

SUPERIOR COURT,  
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered against her notwithstanding a verdict for \$3,500 in her favor, in an action for personal injuries alleged to have been caused by the giving way of a part of the pavement on Elston avenue at or near its intersection with Western avenue and Diversey boulevard during the time those streets were torn up for the repair and improvement of Diversey boulevard by repaving and grading same.

The Mid-West Construction Corporation, hereafter called defendant, was made a party to the action on the filing of the second amended complaint, a year after the original complaint was filed. The original defendant, City of Chicago, and Robert R. Anderson, made defendant in the first amended complaint, were dismissed out of the proceeding on motion of the plaintiff before the trial resulting in the verdict. The complaint charged that Anderson and defendant were engaged in the repair and improvement of the street at the scene of the accident and were guilty of negligence in causing or permitting the conditions alleged to have caused the injury. Defendant denies any participation in or responsibility for the condition, repair or improvement of said streets.

After verdict defendant made a motion for judgment notwithstanding the verdict, which was allowed. The reasons assigned in support of the motion were that there was no evidence that the machinery and equipment used on the highway improvements were in the



19483

Appellant,

Appellee.

v.

Mid-West Construction Corporation,  
Appellee.

Appellant From

Superior Court,

Cook County.

MR. JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered against her notwithstanding a verdict for \$2,500 in her favor, in an action for personal injuries alleged to have been caused by the giving way of a part of the pavement on Madison Avenue at or near its intersection with Western Avenue and Diversey Boulevard during the time those streets were torn up for the repair and improvement of Diversey Boulevard by repaving and grading same.

The Mid-West Construction Corporation, hereafter called defendant, was made a party to the action on the filing of the second amended complaint, a year after the original complaint was filed. The original defendant, City of Chicago, and Robert P. Anderson, made defendant in the first amended complaint, were dismissed out of the proceeding on motion of the plaintiff before the trial resulting in the verdict. The complaint charged that Anderson and defendant were engaged in the repair and improvement of the street at the scene of the accident and were guilty of negligence in causing or permitting the conditions alleged to have caused the injury. Defendant denies any participation in or responsibility for the condition, repair or improvement of said streets.

After verdict defendant made a motion for judgment notwithstanding the verdict, which was allowed. The reasons assigned in support of the motion were that there was no evidence that the machinery and equipment used on the highway improvements were in the



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possession or control of defendant or that it was engaged in any operations in connection with such improvements, and that the record shows without contradiction that the highway improvements at the place of the accident were made by Mrs. Myrtle Levy, Mrs. Virginia Bederman, and their respective husbands, Arthur K. Levy and N. B. Bederman, co-partners doing business as the Mid-West Construction Company, pursuant to a contract between them and the County of Cook, solely on their own behalf and with their own equipment and not as agents for or on behalf of defendant.

Plaintiff does not rely upon any direct evidence to establish defendant's connection with the repairing and the improvements. Plaintiff contends that the machinery and equipment used on the job are shown to be the property of the defendant; that from the fact of ownership arises a presumption that the men operating and handling the machinery and equipment were the agents and servants of defendant; that evidence of ownership and the presumption following require the submission of the case to the jury; that the partnership was merely a cloak under which the defendant's business was carried on.

In passing upon a motion for judgment notwithstanding a verdict the court is governed by rules controlling it in passing upon a motion for a directed verdict at the close of all the evidence. The court cannot weigh the evidence. It passes upon a matter of law. The question is whether, when all the evidence is considered, together with all reasonable inferences from it, in its most favorable aspect to the party against whom the motion is directed, there is a total failure to prove the necessary elements of his case. Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387.

Flahive, a discharged employee of defendant, appearing as plaintiff's witness, testified that defendant owned the machinery used on the job and that a part of it bore the name of defendant. Plaintiff relies entirely upon the presumption or inference of agency in operation of the machinery arising from the evidence and presumption of ownership. In none of the cases cited by plaintiff in support of

possession or control of defendant or that it was engaged in any operations in connection with such improvements, and that the record shows without contradiction that the highly improvements at the place of the accident were made by Mrs. Myrtle Levy, Mrs. Virginia Neiderman, and their respective husbands, Arthur L. Levy and M. B. Neiderman, co-partners doing business as the Mid-West Construction Company, pursuant to a contract between them and the County of Cook, solely on their own behalf and with their own equipment and not as agents for or on behalf of defendant.

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In passing upon a motion for judgment notwithstanding a verdict the court is governed by rules controlling it in passing upon a motion for a directed verdict at the close of all the evidence. The court cannot weigh the evidence. It passes upon a matter of law. The question is whether, when all the evidence is considered, together with all reasonable inferences from it, in its most favorable aspect to the party against whom the motion is directed, there is a total failure to prove the necessary elements of his case. Johnson v. Stutz

Chicago Factory Branch, 41 Ill. 327.

Plaintiff, a discharged employee of defendant, appearing as Plaintiff's witness, testified that defendant owned the machinery used on the job and that a part of it bore the name of defendant. Plaintiff relies entirely upon the presumption or inference of agency in operation of the machinery arising from the evidence and presumption of ownership. In none of the cases cited by Plaintiff in support of



her position did the defendants offer any evidence to rebut the presumption. In this case the evidence shows without contradiction that the work was being done under a contract of <sup>the</sup> partnership; that Levy and Bederman, members of the partnership and signers of the contract, were using the machinery and equipment on the job and that all labor on the job was paid for by the company. The evidence overcomes the presumption, which ceases to exist and cannot be considered as evidence in passing upon a motion for a directed verdict or for judgment notwithstanding the verdict. In Lohr v. Barkmann Cartage Co., 335 Ill. 335, the court was considering an action in which plaintiff was struck and injured by a truck of defendant, who admitted that on the day of the accident the driver was its agent, but contended and offered evidence which was undisputed that at the time of the accident the driver was not in the course of his employment but was on a frolic of his own. In holding that the trial court erred in not directing a verdict, the court (p.340) said: "While it is admitted by plaintiff in error that Schwinnen on that day was its agent and the presumption exists that the agency having been established continues, (Kavale v. Morton Salt Co. 329 Ill. 445,) such presumption is not evidence. Presumptions are never indulged where established facts exist. They supply the place of facts. When evidence is produced which is contrary to the presumption the presumption vanishes entirely. (Osborne v. Osborne, 325 Ill. 229; 1 Jones' Com. on Evidence, 75.)" To the same effect are Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387; Paulsen v. Cochfield, 278 Ill. App. 596; Trust v. Chicago Motor Club, 276 Ill. App. 289. As this presumption of agency and operation was a vital link in plaintiff's case, and was destroyed by the evidence of defendant, the trial court did not err in entering judgment notwithstanding the verdict unless there is evidence to support plaintiff's claim that the partnership was merely a cloak under which defendant's business was carried on.

The corporation is an entity separate and distinct from its



her position did the defendant offer any evidence to rebut the presumption. In this case the evidence shows without contradiction that the work was being done under a contract of partnership; that the partnership, members of the partnership and agents of the partnership, were using the machinery and equipment on the job and that all labor on the job was paid for by the company. The evidence overcomes the presumption, which ceases to exist and cannot be considered as evidence in passing upon a motion for a directed verdict or for judgment notwithstanding the verdict. In Loft v. Laramie, 238 Ill. 335, the court was considering an action in which plaintiff was struck and injured by a truck of defendant, who admitted that on the day of the accident the driver was its agent, but contended and offered evidence which was admitted that at the time of the accident the driver was not in the course of his employment but was on a frolic of his own. In holding that the trial court erred in not directing a verdict, the court (p. 340) said: "While it is admitted by plaintiff in error that Schwenen on that day was its agent and the presumption exists that the agency having been established continues, (Kyle v. Norton Safe Co., 235 Ill. 445,) such presumption is not evidence. Presumptions are never indulged where established facts exist. They supply the place of facts. When evidence is produced which is contrary to the presumption the presumption vanishes entirely. (Ophure v. Ophure, 235 Ill. 31; Jones' Co. on Evidence, 75.)" To the same effect are Helson v. State Chicago Factory Branch, 341 Ill. 307; Palmer v. Cochrane, 238 Ill. App. 228; Kear v. Chicago Motor Club, 278 Ill. App. 230. In this presumption of agency and operation was a vital link in plaintiff's case, and was destroyed by the evidence of defendant, the trial court did not err in entering judgment notwithstanding the verdict unless there is evidence to support plaintiff's claim that the partnership was merely a cloak under which defendant's business was carried on.

The corporation is an entity separate and distinct from its

4.

shareholders. It is therefore separate and distinct from any partnership composed of the corporation stockholders. This distinction will be disregarded only when it is necessary to contravene fraud. Dregne v. Five Cent Cab Co., 381 Ill. 594. There is no element of fraud charged or proved.

April 1, 1937, Mrs. Myrtle Levy and Mrs. Virginia Bederman, owners of all the capital stock of defendant, and their respective husbands, (employees and officers of defendant) formed a co-partnership under the name of Mid-West Construction Company; May 20, 1937, a certificate of intention to dissolve defendant within a period not exceeding two years of that date was filed with the secretary of state; April 28, 1938, the board of directors of defendant declared a liquidating dividend to be paid in kind by transferring to the two stockholders jointly, machinery, automobiles, tools and office equipment valued at \$39,343.14, and the officers of the corporation were authorized and directed to transfer and convey such machinery, etc., and to execute a proper bill of sale. This is the machinery and equipment used on the repair and improvements of the street at the place of injury to plaintiff. July 17, 1938, the contract for improving by paving and grading Diversey boulevard (avenue) from Kimball avenue to Logan boulevard, which included the intersection of Elston avenue, Western avenue and Diversey boulevard, and the scene of plaintiff's accident, was entered into between the County of Cook and the Mid-West Construction Company, the co-partnership mentioned above. October 31, 1938, plaintiff was injured. February 6, 1939, the secretary of state issued a final certificate of dissolution of the defendant. March 18, 1940, defendant was made an additional party defendant to this action.

The partnership was created and the dissolution of the defendant began more than 17 months before plaintiff's accident. The proceedings for dissolution were necessarily a matter of public record in the office of the secretary of state and the recorder of deeds from May 1937. After paying or adequately providing for payment of all its



partnership composed of the corporation stockholders. This dissolution will be disregarded only when it is necessary to continue the same. Pratt v. Five Cent Cab Co., 301 Ill. 594. There is no element of fraud charged or proved.

April 1, 1937, Mrs. Myrtle Levy and Mrs. Virginia Nebecker, owner of all the capital stock of defendant, and their respective husbands, (employees and officers of defendant) formed a co-partnership under the name of Mid-West Construction Company; May 20, 1937, a certificate of intention to dissolve defendant within a period not exceeding two years of that date was filed with the secretary of state; April 20, 1938, the board of directors of defendant decided to liquidating dividend to be paid in kind by transferring to the two stockholders jointly, machinery, automobiles, tools and office equipment valued at \$39,348.14, and the officers of the corporation were authorized and directed to transfer and convey such machinery, etc., and to execute a proper bill of sale. This is the machinery and equipment used on the repair and improvements of the street at the place of injury to plaintiff. July 17, 1938, the contract for improving by paving and grading Diversey boulevard (avenue) from Madison avenue to Logan boulevard, which included the intersection of Madison avenue, Western avenue and Diversey boulevard, and the scene of plaintiff's accident, was entered into between the County of Cook and the Mid-West Construction Company, the co-partnership mentioned above.

October 27, 1938, plaintiff was injured. February 6, 1939, the secretary of state issued a final certificate of dissolution of the defendant. March 18, 1940, defendant was made an additional party defendant to this action.

The partnership was created and the dissolution of the defendant began more than 17 months before plaintiff's accident. The proceedings for dissolution are necessarily a matter of public record in the office of the secretary of state and the recorder of deeds from May 1937. After paying or about only providing for payment of all its



5.

obligations, the corporation was obliged to distribute the remainder of its assets either in cash or in kind among its shareholders. The distribution of the machinery, etc., could be made only to Mrs. Levy and Mrs. Bederman. This distribution became a matter of public record as part of the final certificate of dissolution issued by the secretary of state and filed by him in his office and in the office of the recorder of deeds. This distribution was made almost three months before the contract for improving Diversey boulevard was entered into and more than six months before the accident to plaintiff. The contract with Cook county was also a public record open to any who might inquire. The final certificate of dissolution was a matter of public record more than 13 months before any claim was made against defendant for plaintiff's injuries.

No reason for practicing fraud or, as plaintiff claims, making the partnership merely a cloak under which defendant's business might be carried on, is disclosed by the evidence or suggested by plaintiff's argument. By doing business as a partnership instead of a corporation the liabilities of the partners were increased, not diminished. To the stockholder's liabilities of the ladies was added the personal liabilities of the ladies and their husbands. There is not the slightest bit of evidence of any fraudulent purpose in the organization or transactions of the partnership, and therefore no presumption or inference as a matter of law of its agency or operation on behalf of defendant rendering the latter liable for the acts of the members, agents or servants of the partnership.

The trial court properly granted defendant's motion and entered judgment against the plaintiff notwithstanding the verdict. The judgment of the Superior court is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

obligation, the corporation was obliged to distribute the remainder of its assets either in cash or in kind among its shareholders. The distribution of the assets, etc., could be made only to Mrs. Levy and Mrs. Bederman. This distribution became a matter of public record as part of the final certificate of dissolution issued by the secretary of state and filed by him in his office and in the office of the recorder of deeds. This distribution was made almost three months before the contract for improving Live Oak Boulevard was entered into and more than six months before the accident to plaintiff. The contract with Cook County was also a public record open to any who might inquire. The final certificate of dissolution was a matter of public record more than 15 months before any claim was made against defendant for plaintiff's injuries.

No reason for practicing fraud or, as plaintiff claims, making the partnership merely a cloak under which defendant's business might be carried on, is disclosed by the evidence or suggested by plaintiff's argument. By doing business as a partnership instead of a corporation the liabilities of the partners were increased, not diminished. To the stockholders' liabilities of the ladies was added the personal liabilities of the ladies and their husbands. There is not the slightest bit of evidence of any fraudulent purpose in the organization or transactions of the partnership, and therefore no presumption or inference as a matter of law of its fraud or operation on behalf of defendant rendering the latter liable for the acts of the partners, agents or servants of the partnership.

The trial court properly granted defendant's motion and entered judgment against the plaintiff notwithstanding the verdict. The judgment of the superior court is affirmed.

APPROVED.



42564

THE PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

FRANCISCO CHAVEZ,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT,  
OF CHICAGO.

320 I.A. 358

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 22, 1942, by leave of court, an information was filed charging that defendant on October 20, 1942, assaulted Regugio Villanueva with a knife contrary to the statute. On the same day defendant was arraigned and pleaded not guilty. The judgment order states: "Defendant waives jury trial." The case was then heard before the court without a jury, witnesses were examined, the court found defendant guilty of the "criminal offense of willful and malicious assault with a deadly weapon" as charged in the information and he was sentenced to the House of Correction for a term of two months. He prosecutes this writ of error.

The information was on a printed, blank form which charged defendant on "towit, on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. 193\_\_\_\_." The blank spaces were filled by writing "20" and "Oct." and after the figures "193" were typewritten the figures "42" and defendant contends that this charged the offense to have occurred on the 20th of October, 19342, which was a wrong or impossible year, and therefore the information is insufficient to sustain the conviction. We think there is no merit in this contention. It is perfectly obvious that defendant was charged with having committed the offense on the 20th of October, 1942. Moreover, no objection was made by defendant to the information in the trial court and such defect as contended for, if any, was waived.

People v. Perca, 181 Ill. App. 668.



THE PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

ERROR TO

MUNICIPAL COURT,

OF CHICAGO.

FRANCISCO CHAVEZ,  
Plaintiff in Error.

320 I.A. 258

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 22, 1942, by leave of court, an information was filed charging that defendant on October 20, 1942, assaulted Refugio Villanueva with a knife contrary to the statute. On the same day defendant was arraigned and pleaded not guilty. The judgment order states: "Defendant waives jury trial." The case was then heard before the court without a jury, witnesses were examined, the court found defendant guilty of the "criminal offense of willful and malicious assault with a deadly weapon" as charged in the information and he was sentenced to the House of Correction for a term of two months. He prosecutes this writ of error.

The information was on a printed, blank form which charged defendant on "to-wit, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 193\_\_\_\_." The blank spaces were filled by writing "30" and "Oct." and after the figures "193" were typewritten the figures "42" and defendant contends that this charged the offense to have occurred on the 30th of October, 19342, which was a wrong or impossible year, and therefore the information is insufficient to sustain the conviction. We think there is no merit in this contention. It is perfectly obvious that defendant was charged with having committed the offense on the 30th of October, 1942. Moreover, no objection was made by defendant to the information in the trial court and such defect as contended for it any, was waived.

People v. Perez, 181 Ill. App. 888.

2.

Defendant further contends that "It was obligatory upon the trial court to comprehensively advise the defendant of his right to a jury trial as a condition precedent to the defendant waiving his right thereto," and in support of this counsel say: "The record merely shows that the defendant waived jury trial. It fails to show that the defendant was 'duly advised of his right to such jury trial' as a condition precedent to his waiving such jury trial."

Since there is no report of the proceedings in the record, what the court said to defendant as to his right to a jury trial and to be represented by counsel, does not appear. The record simply shows that defendant waived a jury trial. In this state of the record it must be presumed that the waiver of a trial by jury was understandingly made and that the right of defendant to have a trial by jury and to be represented by counsel was fully explained to him by the court. People v. Glade, 319 Ill. App. 114 (abst.).

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and Niemeyer, J., concur.

Defendant further contends that "it was obligatory upon the trial court to comprehensively advise the defendant of his right to a jury trial as a condition precedent to the defendant waiving his right thereto," and in support of this counsel say: "The record merely shows that the defendant waived jury trial. It fails to show that the defendant was 'fully advised of his right to such jury trial' as a condition precedent to his waiving such jury trial."

Since there is no report of the proceedings in the record, what the court said to defendant as to his right to a jury trial and to be represented by counsel, does not appear. The record simply shows that defendant waived a jury trial. In this state of the record it must be presumed that the waiver of a trial by jury was understandingly made and that the right of defendant to have a trial by jury and to be represented by counsel was fully explained to him by the court. People v. Glade, 318 Ill. App. 114 (2d ct.).

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, J., and Niemeyer, J., concur.



320 I.A. 358<sup>2</sup>

42601

ALVINA SOLTOW, as Executrix of the  
Last Will and Testament of Anna  
Zimmerman, Deceased,

Appellant,

~~OTTO BAUMGARTH and ELSBETH BAUMGARTH~~

~~OTTO BAUMGARTH,~~

Appellee.

APPEAL FROM

MUNICIPAL COURT,  
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 2, 1931, defendants, Otto Baumgarth and Elsbeth Baumgarth, his wife, executed their demand note for \$1150, payable to the order of Miss Anna Zimmerman, with interest at 6 per cent per annum. The parties at that time all lived in Chicago and the note was made here. Anna Zimmerman afterwards died testate and plaintiff, her executrix, brought suit on the note to recover the balance due on the principal of the note, \$1,000, with interest thereon at 6 per cent per annum from January 2, 1932. Otto Baumgarth was the only one served with process, the wife, Elsbeth having left Chicago in April, 1931 and resided in Los Angeles, California. The defense set up by Otto Baumgarth was that the note was not delivered, that there was no consideration for it and therefore it was a nullity, and as a further defense, the 10 year Statute of Limitations was pleaded. There was a trial before the court without a jury. At the close of plaintiff's case counsel for defendant stated: " I have no testimony, if the Court please. Under the rules, I cannot offer the defendant as a witness. The administrator is suing." The court then found in favor of defendant, judgment was entered on the finding and plaintiff appeals.

3201A.338

42801

ALVINA BOLTON, as executrix of the  
Last Will and Testament of Anna  
Zimmerman, Deceased,  
Appellant,

A FEEL FROM

MUNICIPAL COURT,  
OF CHICAGO.

OTTO BAUMGARTH and ELIZABETH BAUMGARTH

OTTO BAUMGARTH,

Appellee.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 2, 1931, defendants, Otto Baumgarth and Elizabeth  
Baumgarth, his wife, executed their demand note for \$1150, payable  
to the order of Miss Anna Zimmerman, with interest at 6 per cent per  
annum. The parties at that time all lived in Chicago and the note  
was made here. Anna Zimmerman afterwards died testate and plaintiff,  
her executrix, brought suit on the note to recover the balance due  
on the principal of the note, \$1,000, with interest thereon at 6 per  
cent per annum from January 2, 1932. Otto Baumgarth was the only one  
served with process, the wife, Elizabeth having left Chicago in April,  
1931 and resided in Los Angeles, California. The defense set up by Otto  
Baumgarth was that the note was not delivered, that there was no  
consideration for it and therefore it was a nullity, and as a further  
defense, the 10 year statute of limitations was pleaded. There was a  
trial before the court without a jury. At the close of plaintiff's  
case counsel for defendant stated: "I have no testimony, if the  
Court please. Under the rules, I cannot offer the defendant as a  
witness. The administrator is suing." The court then found in favor  
of defendant, judgment was entered on the finding and plaintiff  
appeals.



Defendant, Elsbeth Baumgarth's deposition was taken by plaintiff at Los Angeles, and the substance of her testimony is that she was Otto's wife but had been living for the past 11 years in California. That the administratrix, Alvina Soltow, was her sister; that she and her husband executed and delivered the note in Chicago; that the payee, Anna Zimmerman, was no relation but a friend whom she had known all her life. That after the note was made out, it was delivered to Anna Zimmerman; that she and her husband borrowed money at different times from Miss Zimmerman who at one time gave them \$500 to buy furniture while they lived in Chicago and that the money was borrowed in different amounts, for some of which they had given notes. These notes were all taken up and the note in question was given to cover the entire amount due. The note shows the following payments made by endorsement: \$50, February 23, 1931; \$50 February 28, 1931; \$50 July 1, 1931; and \$30 interest on the note paid July 1, 1931, and January 2, 1932, payment of six months' interest of \$30. She testified this money had been given to her by her husband, the defendant, who used to turn all of his salary over to her to run the household and to pay all the bills and she told him she had made the several payments on the notes. She also testified as to the handwriting showing the payments endorsed on the note, and that after she went to California her husband from time to time sent her money and went to see her in Los Angeles in 1932, 1933 and 1936.

A letter was introduced from him to her dated March 22, 1933, when he sent her \$500. The letter is as follows: "Elsie, deposit this \$500 in a safe bank in your name and use it as you see fit. Go to a reliable dentist for Leota's teeth, don't take the first one's advice if he says her front tooth is too far gone. Try to save it. Tend to your own teeth and health also. Don't send any money to anyone. I'll take care of all these debts. Love Otto." The court properly admitted this letter for the purpose of showing the relationship between the parties.



Defendant, Elizabeth Baumgardner's deposition was taken by plaintiff at Los Angeles, and the substance of her testimony is that she was Otto's wife but had been living for the past 11 years in California. That the administratrix, Alvina Goltow, was her sister; that she and her husband executed and delivered the note in Chicago; that the payee, Anna Zimmerman, was no relation but a friend whom she had known all her life. That after the note was made out, it was delivered to Anna Zimmerman; that she and her husband borrowed money at different times from Miss Zimmerman who at one time gave them \$500 to pay furniture while they lived in Chicago and that the money was borrowed in different amounts, for some of which they had given notes. These notes were all taken up and the note in question was given to cover the entire amount due. The note shows the following payments made by endorsement: \$50, February 23, 1931; \$50 February 28, 1931; \$50 July 1, 1931; and 30 interest on the note paid July 1, 1931, and January 2, 1932, payment of six months' interest of \$50. She testified this money had been given to her by her husband, the defendant, who used to turn all of his salary over to her to run the household and to pay all the bills and she told him she had made the several payments on the notes. She also testified as to the handwriting showing the payments endorsed on the note, and that after she went to California her husband from time to time sent her money and went to see her in Los Angeles in 1932, 1933 and 1936.

A letter was introduced from him to her dated March 21, 1932, when he sent her \$500. The letter is as follows: "Miss, deposit this \$500 in a safe bank in your name and use it as you see fit. Go to a reliable dentist for Leo's teeth, don't take the first one's advice if he says her front tooth is too far gone. Try to save it. Tend to your own teeth and health also. Don't send any money to anyone. I'll take care of all these debts. Love Otto." The court properly admitted this letter for the purpose of showing the relationship between the parties.

3.

Elsbeth further testified in the deposition on direct examination that she had made all the payments shown by the endorsements on the note, in Chicago, but on cross-examination by counsel for defendant, when it was brought to her attention that she had left Chicago in 1931, and the last payment was not made until January 2, 1932, she testified that the matters were not clear in her mind but that she must have made the last payment from Los Angeles by sending the money to the payee, Anna Zimmerman, who still lived in Chicago. This is shown by the questions and answers. Counsel for defendant asked: "Q. In view of the fact that you left the City of Chicago during the month of April, 1931, and the notations on the back of the note in question purport to show that fifty dollars was paid to Anna Zimmerman on July 1, 1931, as well as thirty dollars interest on the same date, and in addition thereto purport to show that thirty dollars as six months' interest was paid on January 2, 1932, would you say that the last two payments, which were made on July 1, 1931, and January 2, 1932, were made by you from Los Angeles, and were paid by you to Anna Zimmerman? A That is the way it must have been. I am sorry I am not able to recollect the dates more clearly; it is so hard to recall all these different dates, but I am sure that I left Chicago in 1931."

Plaintiff called defendant, Otto Baumgarth; he testified on the trial and identified the letter he had written his wife March 21, 1933, from which we have above quoted.

The court, in deciding the case said: "Well, I think all of the cases hold that a payment made within the ten year period of the statute, either an interest payment or a payment on the principal, gives rise to the implication of a new promise on the part of the maker to pay the balance.

"Now, I am afraid the plaintiff has failed to meet the burden that is placed upon him to show that this defendant, Baumgarth, either



Elizabeth further testified in the deposition on direct examination that she had made all the payments shown by the endorsements on the note, in Chicago, but on cross-examination by counsel for defendant, when it was brought to her attention that she had left Chicago in 1931, and the last payment was not made until January 2, 1932, she testified that the matters were not clear in her mind but that she must have made the last payment from Los Angeles by sending the money to the payee, Anna Zimmerman, who still lived in Chicago. This is shown by the questions and answers. Counsel for defendant asked: "Q. In view of the fact that you left the City of Chicago during the month of April, 1931, and the notations on the back of the note in question purport to show that fifty dollars was paid to Anna Zimmerman on July 1, 1931, as well as thirty dollars interest on the same date, and in addition thereto purport to show that thirty dollars as six months' interest was paid on January 2, 1932, would you say that the last two payments, which were made on July 1, 1931, and January 2, 1932, were made by you from Los Angeles, and were paid by you to Anna Zimmerman? A. That is the way it must have been. I am sorry I am not able to recollect the dates more clearly; it is so hard to recall all these different dates, but I am sure that I left Chicago in 1931." Plaintiff called defendant, Otto Baumgart, he testified on the trial and identified the letter he had written his wife March 21, 1932, from which we have above quoted.

The court, in deciding the case said: "Well, I think all of the cases hold that a payment made within the ten year period of the statute, either an interest payment or a payment on the principal, gives rise to the implication of a new promise on the part of the maker to pay the balance.

"Now, I am afraid the plaintiff has failed to meet the burden that is placed upon him to show that this defendant, Baumgart, either



4.

made the payment or directed someone else to make the payment on his behalf. I do not think that the fact that the wife made the payment - - as a matter of fact, I think if he had continued to make any payments on the note, it would have been much easier for him to make them direct, in view of the fact that the owner of the note at that time and he, himself, were here in Chicago, while the wife was in California.

"It seems to me that \*\*\* these payments were voluntary acts on the part of the wife and cannot be construed as being binding upon the husband."

We think the court failed to consider the question whether defendant had ratified the payments made. The wife testified that she told him that she had made these payments and in these circumstances we think it must be held that the payments were ratified by him. Coulson v. Hartz, 47 Ill. App. 20; Edwards v. Harper, 234 Ill. App. 296; Joseph v. Carter, 314 Ill. App. 630.

In the Edwards case the court said: "A partial payment on a promissory note by one of several makers will not prevent the running of the statute of limitations. Kallenbach v. Dickinson, 100 Ill. 427; Boynton v. Spafford, 162 Ill. 113; Waughop v. Bartlett, 165 Ill. 124. But if there is a payment of either principal or interest with the knowledge, assent or subsequent ratification of the surety or joint maker, the running of the statute is arrested as to both principal and interest."

The judgment of the Municipal court is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against defendant, Otto Baumgarth, for \$1,000, with interest at 6% per annum from January 2, 1932.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer, J., and Matchett, J., concur.

made the payment or directed someone else to make the payment on his behalf. I do not think that the fact that the wife made the payment -- as a matter of fact, I think if he had continued to make any payments on the note, it would have been much easier for him to make them direct, in view of the fact that the owner of the note at that time and he, himself, were here in Chicago, while the wife was in California.

"It seems to me that \*\*\* these payments were voluntary acts on the part of the wife and cannot be construed as being binding upon the husband."

We think the court failed to consider the question whether defendant had ratified the payments made. The wife testified that she told him that she had made these payments and in these circumstances we think it must be held that the payments were ratified by him. Confalon v. Hartz, 47 Ill. App. 20; Edwards v. Harter, 234 Ill. App. 226; Joseph v. Carter, 314 Ill. App. 630.

In the Edwards case the court said: "A partial payment on a promissory note by one of several makers will not prevent the running of the statute of limitations." Kallenbach v. Dickinson, 100 Ill. 427; Boynton v. Spafford, 182 Ill. 113; Washburn v. Bartlett, 166 Ill. 134. But if there is a payment of either principal or interest with the knowledge, consent or subsequent ratification of the surety or joint maker, the running of the statute is arrested as to both principal and interest."

The judgment of the Municipal court is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against defendant, Otto Baumgart, for \$1,000, with interest at 6% per annum from January 2, 1932.

REVEREND AND HONORABLE WITH DIRECTIONS.

Misses, J., and Mathelet, J., concur.



42616

320 I.A. 359

RUTH SCHIKORA,  
Appellee,

v.

FREEPORT MOTOR CASUALTY COMPANY,  
Appellant.

APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the Casualty Company, to recover the amount of a judgment for \$3,000, court costs and interest thereon from September 29, 1939, the date of the judgment she had obtained in a personal injury suit brought by her, by her next friend, against Joseph W. Grabowski, to whom defendant had issued an insurance policy. Defendant denied liability on the ground that it had not been notified by the insured, Joseph W. Grabowski, of the pendency of the personal injury case brought against him. There was a jury trial, a verdict and judgment in plaintiff's favor for \$3,000 and defendant appeals.

The record discloses that July 13, 1936, defendant issued its policy of insurance to Joseph W. Grabowski in the usual form, covering an automobile owned by Grabowski. February 27, 1937, while the policy was in force, John Grabowski, a brother of Joseph, the insured, was driving the automobile as Joseph's agent, and plaintiff Ruth Schikora, then 16 years old, was riding in the automobile when there was an accident, as a result of which she was injured. On or about July, 1937, defendant was notified of the accident and of its claimed liability, but apparently nothing was done. More than a year afterward, August 20, 1938, Ruth Schikora, by her next friend, brought an action against Joseph Grabowski to recover damages for the injuries she sustained. A copy of the summons issued in that case was attached to and made a part of the complaint in the instant case and the return of



3201A 233

A PICAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

FRUITPORT MOTOR CASUALTY COMPANY,  
Appellant.

RUTH SCHINKORA,  
Appellee.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the Casualty Company, to recover the amount of a judgment for \$5,000, court costs and interest thereon from September 20, 1936, the date of the judgment she had obtained in a personal injury suit brought by her, by her next friend, against Joseph W. Grabowski, to whom defendant had issued an insurance policy. Defendant denied liability on the ground that it had not been notified by the insured, Joseph W. Grabowski, of the pendency of the personal injury case brought against him. There was a jury trial, a verdict and judgment in plaintiff's favor for \$5,000 and defendant appeals.

The record discloses that July 15, 1936, defendant issued its policy of insurance to Joseph W. Grabowski in the usual form, covering an automobile owned by Grabowski. February 27, 1937, while the policy was in force, John Grabowski, a brother of Joseph, the insured, was driving the automobile as Joseph's agent, and plaintiff Ruth Schinkora, then 16 years old, was riding in the automobile when there was an accident, as a result of which she was injured. On or about July, 1937, defendant was notified of the accident and of its claimed liability, but apparently nothing was done. More than a year afterward, August 20, 1938, Ruth Schinkora, by her next friend, brought an action against Joseph Grabowski to recover damages for the injuries she sustained. A copy of the summons issued in that case was attached to and made a part of the complaint in the instant case and the return of

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the sheriff shows that he served defendant, Joseph Grabowski, on August 31, 1938.

The defendant in that case entered no appearance and September 29, 1939, more than a year after the action was brought and the summons served, he was defaulted, a jury impaneled to assess the damages, they returned a verdict in plaintiff's favor against defendant for \$3,000 and judgment was entered for that sum. At that time Ruth had become of age and she was substituted as plaintiff. After the judgment was entered nothing was done until November 1, 1939, when an execution was issued and demand made by the sheriff on Joseph Grabowski for payment, on November 5, 1939. The first part of December, 1939, Joseph Grabowski sent the execution, together with the bill of costs to the Casualty Company. It took the position it was not liable under its policy because it had not been notified, as the policy required, of the pendency of the personal injury suit.

Plaintiff, in her complaint, alleged that after the accident, which occurred February 27, 1937, Joseph Grabowski notified the Casualty Company and it undertook the investigation and the defense of her claim and further alleged on information and belief, that shortly after the summons was served on Joseph Grabowski he caused it to be delivered to defendant Casualty Company at its office in Oak Park and that defendant's representative, to whom the summons was delivered, promised to defend the personal injury suit.

Plaintiff's suit was predicated on Ill. Rev. Stat. 1935, ch. 73, par. 466, §1, which authorized her to bring the suit direct against the Casualty Company.

At the close of the evidence, counsel for defendant submitted a special interrogatory by which the jury were asked whether Joseph Grabowski, either personally or through his agent, had forwarded and delivered the summons in the personal injury suit to the defendant Casualty Company which the jury answered in the affirmative.

Counsel for plaintiff say that counsel for defendant did not



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follow Rule 7 in the preparation of his brief. There is merit in this saying. Apparently no attempt was made to follow the provisions of Rule 7, and our work has therefore been greatly increased.

The sole question in the case was whether the summons in the personal injury case had been delivered to the Casualty Company. If it had been so delivered within the proper time so that a defense could have been interposed in that case and defendant failed and neglected to do so, then the judgment in this case must be affirmed and there is no contention to the contrary. If the summons had not been given to defendant then the judgment cannot stand and plaintiff makes no contention to the contrary.

The instant case went to trial October 19, 1942, and Patrick Tomaso, called by plaintiff, testified that he had been employed by the insured, Joseph Grabowski, at the time of the accident and for some time thereafter, but was not so employed at the time of the trial. That in the early part of September, 1939, he went to the defendant Casualty Company's place of business which was at 212 Marlon avenue, Oak Park, on the second floor - that it might have been in 1938 - and spoke to a young woman sitting in the office; that he had a summons which was given to him by Joseph Grabowski, and asked the young woman if she would deliver it to Mr. Carr (the manager of the defendant Casualty Company) and that she walked over to the desk where a man about 28 years of age was sitting and handed him the summons; that he read it, looked up and said: "We will take care of this." That he noticed Mr. Grabowski's name, at the time, on the piece of paper, which was yellow; that he then walked out. That at that time he was employed by Mr. Grabowski to lay asphalt floor tiles and wall tiles and linoleum, and ran errands for him.

On cross-examination he testified that he worked for Grabowski from 1936 to 1940, at Grabowski's place of business at Elmhurst, Illinois. That he was working for Grabowski at the time of the accident, which occurred while Mr. Grabowski's brother was driving the car; that the brother also worked about the place in Elmhurst. That

follow Rule 7 in the preparation of his brief. There is merit in this saying. Apparently no attempt was made to follow the provisions of Rule 7, and our work has therefore been greatly increased. The sole question in the case was whether the summons in the personal injury case had been delivered to the Casualty Company. If it had been so delivered within the proper time so that a defense could have been interposed in that case and defendant failed and neglected to do so, then the judgment in this case must be affirmed and there is no contention to the contrary. If the summons had not been given to defendant then the judgment cannot stand and plaintiff makes no contention to the contrary.

The instant case went to trial October 19, 1942, and Patrick Thomas, called by plaintiff, testified that he had been employed by the insurance, Joseph Grabowski, at the time of the accident and for some time thereafter, but was not so employed at the time of the trial. That in the early part of September, 1938, he went to the defendant Casualty Company's place of business which was at 212 Marion Avenue, Oak Park, on the second floor - that it might have been in 1938 - and spoke to a young woman sitting in the office; that he had a summons which was given to him by Joseph Grabowski, and asked the young woman if she could deliver it to Mr. Carr (the manager of the defendant Casualty Company) and that she walked over to the desk where a man about 28 years of age was sitting and handed him the summons; that he read it, looked up and said: "We will take care of this." That he noticed Mr. Grabowski's name, at the time, on the piece of paper, which was yellow; that he then walked out. That at that time he was employed by Mr. Grabowski to lay asphalt floor tiles and wall tiles and linoleum, and ran errands for him. On cross-examination he testified that he worked for Grabowski from 1936 to 1940, at Grabowski's place of business at Elmhurst, Illinois. That he was working for Grabowski at the time of the accident, which occurred while Mr. Grabowski's brother was driving the car; that the brother also worked about the place in Elmhurst. That



he signed a paper in February, 1940, about delivering the summons; that he went over the statement with Mr. Grabowski; that in February, 1940, he was talking to Mr. Grabowski who told him that defendant said the summons had not been delivered and Grabowski then asked him if he would sign a statement and he said he would, and did,

He further testified that on Saturday morning in the early part of September, 1938, Grabowski met him at his home, 7108 W. Belmont avenue, Chicago, that Grabowski came in his automobile as usual and took him to the shop to work; that Grabowski lived about 2 miles from the witness; that Grabowski's office was in Elmhurst but Grabowski lived in Chicago. That they drove to the Elmhurst office and then to Oak Park, Grabowski driving the automobile in which the witness rode. That before they started he and Grabowski talked about the summons and Grabowski asked him if he would deliver the summons because at the time Grabowski had injured his back but was able to drive the car. That Grabowski asked him if he would deliver the summons to the "Freeport Casualty, Mr. Carr;" that up to that time he did not know anything about the suit brought against Grabowski; that he did not read the contents of the summons; that up to that time he had never heard of the Freeport Company; that he did not put the summons in his pocket but held it in his hand while they drove from Elmhurst to Oak Park. He then described the road that they took; that when they arrived in front of defendant's place of business in Oak Park, Grabowski sat in the car and the witness walked up one flight of stairs to defendant's office. That he asked the girl in the office if she would give the paper to Mr. Carr. That he had made a written statement to one of plaintiff's counsel about three weeks ago. The written statement was then produced by one of plaintiff's counsel and handed to counsel for defendant. The witness was then interrogated about the written statement and without going into detail, his testimony was very hazy about the whole matter as to when and where they had driven, etc., except that he had delivered the paper to the young lady who had in turn handed it to Mr. Carr. But about most of



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the questions asked him he was very uncertain.

Ethel Mott, called by defendant, testified that she was the secretary of the Freeport Company at its office in Oak Park and was so employed in September, 1938; that she never saw Mr. Tomaso until he testified in the instant case. She denied Tomaso's conversation and said he never gave her the summons or other paper and that she did not deliver any such paper to Mr. Carr, who was in charge of the office at that time.

Carr testified by deposition, taken before the trial, as he was about to be taken into the Armed Forces of the United States that he was claims attorney for the company in the office in Oak Park; that he first met Grabowski in July, 1937, in connection with the accident and that he did not hear any more about it until December, 1939, when Grabowski sent the execution to defendant; that he never learned of any suit being brought against Grabowski until December 1, 1939; that no summons was ever handed to him in the personal injury case and the first he knew of it was when the execution was sent to him which he returned at once to Mr. Grabowski by registered mail.

Lillian DeMasco, called by defendant, testified that she was a stenographer and secretary to Mr. Crowe, counsel for defendant, and had been so employed for 14 years. That on December 6, 1939, Joseph Grabowski came into their office on LaSalle street, in Chicago, and she was called into the office. She overheard a conversation between Mr. Grabowski and Mr. Crowe - no one else was present - and she took the conversation in shorthand, transcribed her notes and brought them back to Mr. Crowe who read the statement to Mr. Grabowski. It was then handed to Grabowski and he looked it over and signed it in her presence and in the presence of Mr. Crowe. She was then asked: "Now what did Mr. Grabowski at that time and place say in your presence and in my presence with reference to a suit brought against him by \*\*\* Ruth Schikora?" This question was objected to, and the objection was sustained. Counsel for defendant stated that he expected to show by the witness what took place at the time of the preparation and



the questions asked him he was very uncertain.

Etzel Mott, called by defendant, testified that she was the

secretary of the Presport Company at its office in Oak Park and

was so employed in September, 1938; that she never saw Mr. Tomaso

until he testified in the instant case. She denied Tomaso's conver-

sation and said he never gave her the summons or other paper and

that she did not deliver any such paper to Mr. Gave, who was in charge

of the office at that time.

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about to be taken into the Armed Forces of the United States that he

was claims attorney for the company in the office in Oak Park; that

he first met Grabowski in July, 1937, in connection with the accident

and that he did not hear any more about it until December, 1938, when

Grabowski sent the execution to defendant; that he never learned of any

suit being brought against Grabowski until December 1, 1938; that no

summons was ever handed to him in the personal injury case and the first

he knew of it was when the execution was sent to him which he returned

at once to Mr. Grabowski by registered mail.

Lillian Demasco, called by defendant, testified that she was a

stenographer and secretary to Mr. Grove, counsel for defendant, and

had been so employed for 14 years. That on December 8, 1938, Joseph

Grabowski came into their office on LaSalle Street, in Chicago, and

she was called into the office. She overheard a conversation between

Mr. Grabowski and Mr. Grove - no one else was present - and she took

the conversation in shorthand, transcribed her notes and brought them

back to Mr. Grove who read the statement to Mr. Grabowski. It was

then handed to Grabowski and he looked it over and signed it in her

presence and in the presence of Mr. Grove. She was then asked: "Now

what did Mr. Grabowski at that time and place say in your presence

and in my presence with reference to a suit brought against him by \*\*\*

Ruth Schikora?" This question was objected to, and the objection

was sustained. Counsel for defendant stated that he expected to show

by the witness that took place at the time of the preparation and



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signing of the statement by Grabowski in Crowe's office. On objection this was excluded and the statement read out of the presence of the jury.

The evidence further shows that at the beginning of the trial, and for some time thereafter, Joseph Grabowski was in the office of plaintiff's counsel. He was also in the court room during the trial and out in the hall when the witnesses were excluded, and at the close of the day counsel for defendant tried to serve a subpoena on Grabowski but he had left the city, and apparently had gone to Milwaukee and could not be had. One of plaintiff's counsel was called by defendant and testified to this matter - that Grabowski was in their office on the morning of the day the trial began; that in the office he had a talk with the witness, Tomasco, in the presence of Grabowski before the beginning of the trial; that when the trial commenced, the witnesses, on motion, were excluded. We think the evidence of this witness further tends to show that defendant wanted Grabowski as a witness and there was some doubt at the time as to whether Grabowski would also be called by plaintiff. The attorney further testified that at the close of the first day of the trial, he left the court room and afterwards talked to Grabowski on the telephone; that Grabowski called him about 6 o'clock in the evening; that he did not inquire where Grabowski was at the time; that Grabowski said: "I understand there is a subpoena out for me;" that Grabowski said he thought he would have to go to Milwaukee; that the witness said to him: "I do not propose to give you any advice. I represent Miss Schikora. And I am not going to suggest to you what to do, but I will go this far with you. \*\*\* If you are served with subpoena you had better not go to Milwaukee." I did not suggest to him that if he went to Milwaukee he would be out of the jurisdiction of the court and could not be served with a subpoena."

Counsel for defendant contend that the verdict is against the manifest weight of the evidence and that the court erred in not permitting the witness, DeMasco, to testify and to receive in evi-

allowing of the statement by Grabowski in Growe's office. On objection this was excluded and the statement read out of the presence of the jury.

The evidence further shows that at the beginning of the trial, and for some time thereafter, Joseph Grabowski was in the office of plaintiff's counsel. He was also in the court room during the trial and out in the hall when the witnesses were excluded, and at the close of the day counsel for defendant tried to serve a subpoena on Grabowski but he had left the city, and apparently had gone to Milwaukee and could not be had. One of plaintiff's counsel was called by defendant and testified to this matter -- that Grabowski was in their office on the morning of the day the trial began; that in the office he had a talk with the witness, Tomasco, in the presence of Grabowski before the beginning of the trial; that when the trial commenced, the witnesses, on motion, were excluded. We think the evidence of this witness further tends to show that defendant wanted Grabowski as a witness and there was some doubt at the time as to whether Grabowski would also be called by plaintiff. The attorney further testified that at the close of the first day of the trial, he left the court room and afterwards talked to Grabowski on the telephone; that Grabowski called him about 6 o'clock in the evening; that he did not inquire where Grabowski was at the time; that Grabowski said: "I understand there is a subpoena out for me;" that Grabowski said he thought he would have to go to Milwaukee; that the witness said to him: "I do not propose to give you any advice. I represent Miss Schieler. And I am not going to suggest to you what to do, but I will go this far with you. \*\*\* If you are served with subpoena you had better not go to Milwaukee." I did not suggest to him that if he went to Milwaukee he would be out of the jurisdiction of the court and could not be served with a subpoena."

Counsel for defendant contend that the verdict is against the manifest weight of the evidence and that the court erred in not permitting the witness, Demasco, to testify and to receive an evi-



dence the written statement signed December 6, 1939, in the office of counsel for defendant, above mentioned. It must be remembered that plaintiff, Ruth Schikora, was riding in Joseph Grabowski's automobile which was being driven, at the time of the accident, by Grabowski's brother. Grabowski paid no attention as to what became of the case except that he claims he had the summons delivered in apt time to the Casualty Company. It appears that he first learned what had become of the suit against him when he was served with an execution. And of course there can be no doubt on this record that on December 6, Grabowski made the statement in Crowe's office as was sought to be proven by defendant. By that document, which was read into the record out of the presence of the jury, it appears that after the accident occurred, February 27, 1937, he reported it to the Casualty Company; that "I never knew any suit was brought against me, I never received any summons from any court of law and, of course, never having received any summons I never turned any summons or other court papers over to the Freeport Motor Casualty Company. If a suit was brought against me and judgment taken I never had any knowledge of it." This, of course, was directly contrary to plaintiff's evidence, which was the basis of the suit.

Counsel for plaintiff in their brief say: "The court did not err in excluding the evidence of Miss DeMasco offered by defendant to show what Grabowski had said in defendant's office outside of the presence of plaintiff." And the argument is that because plaintiff was not present at the time of the alleged conversation in Crowe's office, the evidence was properly excluded. There is no merit in this contention. The presence or absence of plaintiff at the time of the conversation in Crowe's office was wholly immaterial. Moreover, if Grabowski (who was liable for the judgment in case the Casualty Company was not held liable in the instant case) made the statement attributed to him by the witness DeMasco it would be an admission against his interest, and the evidence was then admissible under



hence the written statement signed December 8, 1937, in the office of counsel for defendant, above mentioned. It must be remembered that plaintiff, Ruth Schikors, was riding in Joseph Grabowski's automobile which was being driven, at the time of the accident, by Grabowski's brother. Grabowski paid no attention as to what became of the same except that he claims he had the summons delivered in apt time to the Casualty Company. It appears that he first learned what had become of the suit against him when he was served with an execution. And of course there can be no doubt on this record that on December 8, Grabowski made the statement in Growe's office as was sought to be proven by defendant. By that document, which was read into the record out of the presence of the jury, it appears that after the accident occurred, February 27, 1937, he reported it to the Casualty Company; that "I never knew any suit was brought against me, I never received any summons from any court of law and, of course, never having received any summons I never turned any summons or other court papers over to the Freeport Motor Casualty Company. If a suit was brought against me and judgment taken I never had any knowledge of it." This, of course, was directly contrary to plaintiff's evidence, which was the basis of the suit.

Counsel for plaintiff in their brief say: "The court did not act in excluding the evidence of Miss Demase offered by defendant to show what Grabowski had said in defendant's office outside of the presence of plaintiff." And the argument is that because plaintiff was not present at the time of the alleged conversation in Growe's office, the evidence was properly excluded. There is no merit in this contention. The presence or absence of plaintiff at the time of the conversation in Growe's office was wholly immaterial. Moreover, if Grabowski (who was liable for the judgment in case the Casualty Company was not held liable in the instant case) made the statement attributed to him by the witness Demase it would be an admission against his interest, and the evidence was then admissible under

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exceptions to the hearsay rule Vol. 5 Wigmore on Evidence, 3rd Ed. §§1420, 1421-1422. The evidence was clearly not subject to the objection made.

In the state of the record, we think there should be a retrial of the case so that Grabowski can be put on the stand.

The judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Niemeyer, J., and Matchett, J., concur.

exceptions to the hearsay rule Vol. 5 Wigmore on Evidence, 3rd Ed. §§1420, 1421-1422. The evidence was clearly not subject to the objection made.

In the state of the record, we think there should be a retrial of the case so that Gradowski can be put on the stand. The judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Wiemeyer, J., and Matcsett, J., concur.



42627

320 I.A. 359<sup>2</sup>

VITO LUCARELLI,  
Appellee,  
v.  
DR. R. A. WINTERS,  
Appellant.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This is a malpractice case brought by plaintiff to recover damages claimed to have been sustained by him on account of the negligent manner in which he was treated by defendant, Dr. Winters. There was a jury trial, a verdict and judgment in plaintiff's favor for \$5,500 and defendant appeals.

Plaintiff was a patient of defendant, a physician and surgeon, who treated plaintiff for a hernia and shortly thereafter treated one of his feet which was troubling him, using an H. G. Fischer 12 meter short wave diathermy machine. The doctor gave him two treatments. Shortly thereafter the foot became aggravated and parts of four toes had to be amputated.

The record discloses that defendant maintained an office in downtown Chicago and first saw plaintiff August 6, 1940; that the doctor gave him an injection treatment for hernia August 12, 1940, and other similar treatments for a short period thereafter. The doctor, called by plaintiff under Section 60, of the Civil Practice Act, testified that about October 6, the day of the last injection treatment, plaintiff complained of trouble with his left foot and that the doctor gave him some tablets; that he looked at the foot which had the appearance of Athlete's foot. This was on October 14. Two days later, plaintiff came back, complained of pains in his foot and at that time the doctor applied the short wave treatment by using the Fischer machine. He

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

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Plaintiff was a patient of defendant, a physician and surgeon, who treated plaintiff for a hernia and shortly thereafter treated one of his feet which was troubling him, using an H. G. Fischer 12 meter short wave diathermy machine. The doctor gave him two treatments. Shortly thereafter the foot became aggravated and parts of four toes had to be amputated.

The record discloses that defendant maintained an office in downtown Chicago and first saw plaintiff August 6, 1940; that the doctor gave him an injection treatment for hernia August 12, 1940, and other similar treatments for a short period thereafter. The doctor, called by plaintiff under Section 80, of the Civil Practice Act, testified that about October 6, the day of the last injection treatment, plaintiff complained of trouble with his left foot and that the doctor gave him some tablets; that he looked at the foot which had the appearance of Athlete's foot. This was on October 14. Two days later, plaintiff came back, complained of pains in his foot and at that time the doctor applied the short wave treatment by using the Fischer machine. He

3261.A. 353

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

VITO LUGARELLI,  
Appellee,  
v.  
DR. R. A. WINTERS,  
Appellant.



2.

described how the patient was made ready, and how the machine was applied for a period of 15 minutes; that this was for the purpose of increasing circulation. There was a nurse in charge and five days later, October 21, defendant treated plaintiff's left foot again by using the machine for the same period of time. The doctor and the nurse gave testimony to this effect. Plaintiff could speak little or no English and a friend of his, Mrs. Caputo went with him to the doctor's office where the two treatments were given. Their testimony is to the effect that during one of the treatments the machine was applied for about half an hour and during the other treatment for about an hour and that on each occasion after the machine had been applied for some time, plaintiff made loud outcries that the machine was burning his foot. The doctor and the nurse denied this and say substantially that he made no such complaint and that the machine was only used 15 minutes on each occasion, having been set by a time clock. The defendant further testified that "you cannot burn a person with a 12 meter machine," such as the one used. Shortly after the second treatment there is evidence to the effect that the doctor was called on the telephone and told that plaintiff's foot was paining him and very sore and defendant told plaintiff to get another doctor, that he did not make calls but only treated people who came to his office downtown.

The evidence further shows that about that time (the middle of October, 1940) Dr. Santoro was called by plaintiff to treat his foot. The doctor made an examination, found the foot was red and swollen and extremely painful to the touch and plaintiff was taken to a hospital where he was treated by Dr. Santoro.

Dr. Santoro, called by plaintiff, testified in substance that after examining the patient's foot he did not diagnose it as having been burned and that he did not come to that conclusion until after the patient had been sent home from the hospital as having recovered. The evidence further shows that about a week after Dr. Santoro had sent the patient home from the hospital, he was called to see him again



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and at that time extracted some of the bones from the ends of four of the toes by pulling them out with forceps.

Before this time the nails of the toes became loose and were removed and counsel for defendant say, "This left the soft tissues expend from their being rotten, then the bone began to show up." And the doctor testified that this was the beginning of osteomyelitis, "That is a death of the bone - the bone putrefies, becomes rotten, so to speak, and it acts as a foreign body in it, as an irritant and it has to come out." On cross-examination he testified that there was more than one cause of Osteomyelitis; that it could be caused by "bruising, a blow, freezing, chilblains, Buerger's disease, which is considered a circulatory affair, hardening of the arteries" and interferes with the circulation; that another cause is due to a burn; that a short wave therapy machine of the character used by defendant, Dr. Winters, could cause such a burn, that a burn was one of the commonest conditions of osteomyelitis and that, in his opinion, the burn he found on plaintiff's foot "might or could have come from a short wave machine."

The evidence further shows that while Dr. Santoro did not pretend to know all about the Fischer machine, such as the one used, yet he had some experience with it and he testified it was similar in some respects to another machine with which he was familiar.

Counsel for defendant say that "Before a plaintiff can recover in a malpractice case, it must be shown by affirmative evidence, first, that defendant was unskillful and negligent, and second, that his want of skill and care caused injury to the plaintiff. If either element is lacking in <sup>the</sup> proof, no case is presented for ~~the~~ consideration of a jury." And in support of this cite a number of authorities, some of which are: Wallace v. Yudelson, 244 Ill. App. 320; Olander v. Johnson, 258 Ill. App. 89; Shireson v. Walsh, 354 Ill. 40. We think this is a correct statement of the law. And counsel contend that there was no proof to sustain the verdict and judgment and that the court erred in not granting defendant's motion at the conclusion of all the evidence to instruct



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the jury to find for defendant.

We think that whether defendant was unskilful or negligent in the treatment of plaintiff's foot, was a question which can be determined only by expert testimony. It is not within the common knowledge of man, as contended for by counsel for plaintiff. We are of opinion, however, that upon a consideration of all the testimony there was some evidence that defendant was unskilful or negligent & defendant's evidence was to the contrary. In these circumstances the question was for the jury. This evidence is found in the testimony of Dr. Santoro. As above stated, his testimony is to the effect that in his opinion, the injury to plaintiff's foot resulted from a deep burn which could have been caused by the machine used on the foot. In these circumstances there was no error in overruling defendant's motion for a directed verdict at the close of all the evidence.

But counsel for defendant further contend that "The hypothetical question asked the witness Santoro was misleading in that it did not contain all the relative facts which were not in dispute." And in support of this counsel say that in the hypothetical question Dr. Santoro was to assume that the hypothetical patient "felt perfectly well before the short wave treatment, other than the hernia; assume that he had nothing wrong with his feet, that he had never had any disease of any kind" while the evidence showed that plaintiff had complained of the foot before he received the first treatment by the defendant doctor using the machine. It is beyond all controversy that plaintiff complained of his foot before he received the treatment. Obviously the defendant doctor would not treat the foot if plaintiff had not been complaining that it was troubling him and it is equally clear that the jury were not in any way misled.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

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The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.



42595

320 I.A. 160

CHARLES CUTLER,

Appellee,

v.

GUSTAVE VILHELM LINDBSTROM and  
HEDVIG ESTERBLOM NORDLI, heirs  
at law of John Lindstrom,  
deceased,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY,

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

John Lindstrom, born in Sweden and resident of Cook County, Illinois, died at the Kenner Hospital in Chicago, about July 23, 1941, intestate. The petitioner, Charles Cutler, filed a petition in the Probate Court of Cook County, claiming his estate, consisting of a deposit of \$9,520.14 in the Continental Illinois National Bank by a gift causa mortis, said to have been made about two days before his death. At the time of the decision in the Probate Court there were no heirs of Lindstrom known to be such by the Probate Court. Such heirs afterwards appeared and from an order of the Probate Court finding the gift by Lindstrom to Cutler to have been as alleged in the petition, appealed to the Circuit Court, where the matter was heard by stipulation on the evidence submitted to the Probate Court and certain exhibits appearing in the record. The cause was heard before Judge Finnegan, no witnesses appearing personally. The finding and judgment again was for the petitioner, Cutler, and the heirs prosecute this further appeal. The public administrator also became a party to the proceeding.

The sole question for decision is whether under the rules of law applicable the evidence before the court was sufficient to establish the gift, as alleged. While the finding of the court is that the persons named are heirs at law of John Lindstrom, the evidence is clear that he did not, at the time of his death, or at any time recognize them to be such. The public administrator was appointed to take charge of his



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HELVIG ESTERLOM NORDBL, heirs  
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Appellants.

APPEAL FROM

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COOK COUNTY,

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

John Lindstrom, born in Sweden and resident of Cook County, Illinois, died at the Kenner Hospital in Chicago, about July 23, 1921, intestate. The petitioner, Charles Cutler, filed a petition in the Probate Court of Cook County, claiming his estate, consisting of a deposit of \$2,520.14 in the Continental Illinois National Bank by a gift causa mortis, said to have been made about two days before his death. At the time of the decision in the Probate Court there were no heirs of Lindstrom known to be such by the Probate Court. Such heirs afterwards appeared and from an order of the Probate Court finding the gift by Lindstrom to Cutler to have been as alleged in the petition, appealed to the Circuit Court, where the matter was heard by stipulation on the evidence submitted to the Probate Court and certain exhibits appearing in the record. The case was heard before Judge Finnegan, no witnesses appearing personally. The finding and judgment again was for the petitioner, Cutler, and the heirs prosecute this further appeal. The public administrator also became a party to the proceeding.

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estate. Claimant's petition was filed in the Probate Court of Cook County, October 2, 1941. The deceased worked for many years at Carson Pirie Scott & Company. His account number at the Continental Illinois National Bank was No. 206075. The last deposit in it was made July 2, 1938. It shows semi-annual credits of interest. A record card of the Swedish Covenant Hospital is in evidence, showing that the deceased entered that hospital on August 7, 1940, and was discharged August 14, 1940. This card indicated that he did not belong to any church denomination and that he had been in the hospital before in 1938. The professional diagnosis was organic heart disease and the final diagnosis was organic heart disease, chronic myocarditis and arteriosclerosis. He gave as reference to the hospital his friend, Oscar Ergang. His bill for hospital services was paid August 14, 1940. His former admission to this hospital was February 3, 1938. He at that time gave his residence as 4911 Catalpa Street and named Oscar Ergang, with whom he boarded, as a reference.

February 3, 1941, Lindstrom had executed in his own handwriting an instrument which described as "My Will". It says:

"All my belongings to Charles Cutler, 3745 N. Wilton Ave., with the provision that a new hundred dollar bill shall be given to each person whose name appears on the card attached to this will and who is still employed at Carson Pirie Scott & Co. State and Madison, receiving room 12 floor. In addition Nick Anderst, Georgia Earnest and Miss Lampman, shall receive one extra hundred dollar bill each. The two maids in the hotel and Bonnie in the restaurant shall also receive a hundred dollar bill each. All my writings, pencilled, penned and typewritten and letters together with a package in the big bookcase, shall be immediately thrown into the furnace and burned. No money shall be expended on my funeral except what is absolutely necessary. Febl 3, 1941. John Lindstrom."

Attached to this writing are the names of 47 persons, who the writer evidently intended should be made the recipients of the gifts mentioned.

May 3, 1941, the deceased executed another writing also in his own handwriting which he also described as "My Will", in which he



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purported to make quite similar disposition of "all his belongings" to Cutler. In this he reduced the amount others than Cutler would receive from 100 dollars to 20 dollars each.

The deceased entered the Kenner Hospital in Chicago, July 1, 1941, as his entrance card shows, at 2:00 P. M. His home address appears as 3022 North Broadway. His attending physician was Dr. Kenner. On this card it is stated his religion is Lutheran and that his nearest relative or friend was Mr. Cutler, "friend".

The testimony as to the gift was given by Ludwig Hertz, by occupation a machine operator employed by Weiland Tool and Die Company. He says he had known John Lindstrom for about a year and a half prior to his death; that Lindstrom at times came over to his house, where he lived with <sup>his</sup> family; that Lindstrom sometimes ate at his house; that he (the witness) visited Lindstrom while he was at the Kenner Hospital two or three times, the last time on Sunday, July 20, 1941, at about 3 o'clock; that he visited him in his room; that Mr. Cutler (petitioner) was with him; that when he entered the room Lindstrom was sitting half way up in his bed. He further says: "Well we came in and we asked him how he feels and he said he wasn't feeling so good, and he asked how the family is and how the kid is, and how is work and all that, and he said to Mr. Cutler, 'Charley,' -- he called him Charley -- 'Charley, you are my best friend I ever had. I have got no relatives, and I have got a bank book here and I give this to you as a gift, and everything what is in it, it is yours.' So Mr. Cutler said, 'Oh, you won't die.' He (Lindstrom) said: 'I know I am going to die and I won't leave this hospital alive.' And Mr. Cutler said, 'Oh, you won't die, John.' And he said, 'No, I feel it, I am going to die and I want you to have this.' And Mr. Cutler thanked him for giving him that as a gift, and he said; 'I will keep it until you get well, and if you come out again I will give you everything back.'"

This witness also testifies that Lindstrom said he had a will in the Barry-Broadway Hotel, which if he had with him he would tear up. The witness also says that he saw the bank book when Lindstrom handed it over to the claimant.

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The witness also says that he saw the bank book when Lindstrom handed



Dr. Kenner, the physician for the deceased, testified that he saw Lindstrom at the hospital <sup>some days</sup> four or five times. He says he asked Lindstrom in his room if he had made any provision for taking care of the hospital bill, and that he replied no and further said that he had turned everything over to Charles Cutler and that "Charley Cutler would take care of the bills". The doctor testified that Lindstrom was mentally sound, conversed rationally, and was a man of education; that he discussed the classics and was well versed therein.

Esther Keeley, the superintendent of the hospital for six years, testified that upon his entrance to the hospital she asked Lindstrom routine questions as a patient; asked him if he had any relatives, to which he replied no and said if anything happened to him to notify Charles Cutler. She asked him what type of room he wanted, and he said he would like to be alone. She wrote the admission board above referred to upon answers given by Lindstrom when he entered the hospital, and it corroborates her evidence.

Charles J. Klowden, manager of the Barry-Broadway Hotel, testified Lindstrom had lived there from the time the witness took charge in May, 1940, until Lindstrom was taken to the hospital; that he saw him in his room many times, had a conversation with him, the last time just before he went to the hospital. The witness says: "I asked him if anything should happen to him, who I should notify. He said, 'Let Charley Cutler know he will take care of everything if anything happens to me.' He said, 'Charley Cutler is the only real friend I have and he will take care of things'." This witness also says that he asked Lindstrom a number of times if he had any relatives or anybody who he could reach, to which he replied, "He said he didn't have a soul; that Charley Cutler was the only one I should contact". This evidence is unimpeached and un rebutted.

Louis Spear, an attorney, testified that he had practiced for three years in Chicago and knew Charley Cutler but never saw John Lindstrom in his lifetime; that the bank book, which is Exhibit 1, was brought to the witness in his office by Charley Cutler on July 23, 1941;



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Dr. Kenner, the physician for the deceased, testified that he saw

5.  
that he returned it to Cutler and told him to keep it; that he went over to the public administrator's office and told Mr. Rubens that he represented a client who had received a gift; that there were no heirs and that he would like to have an estate opened. It is stipulated that Mr. Cutler gave the bank book in question to the public administrator, taking a receipt that it should be received without prejudice.

For obvious reasons gifts causa mortis (not being surrounded by the safeguards which the statute throws about the execution of wills) are not favored at law. Gilmore v. Lee, 237 Ill. 402, 412. The burden of proof as to the gift is always on the donee to prove the facts essential to a valid gift of this kind. It is essential the claimant establish by competent proof the delivery of the property to the donee by the donor with intent to pass the title, and the proof must be clear and convincing. Mere possession of the property after the death of the owner is not sufficient to prove a valid gift. Rothwell v. Taylor, 303 Ill. 226, 230; Peters v. Woods, 251 Ill. App. 374, 375. Where, as here, the gift is of the whole estate, the proof of the gift and its delivery must be clear and satisfactory, and particularly where the donee stands in a trust relationship to the donor. Estate of Williams v. Tuch, 313 Ill. App. 230, 240. Indeed, some authorities hold that the proof necessary to establish such a gift must be made beyond a reasonable doubt. 28 Corpus Juris, 702, Par. 140 (c). Courts are reluctant to base decrees on evidence as to what deadmen have said. Estate of Hanson, 304 Ill. App. 157, 161, 162; Re: Bodenheimer v. Executors of Bodenheimer, 35 La. Ann. 1006, 1007; Davidson v. American Paper Mfg. Co., 188 La. 70, 89 (11).

Appellants say courts are not bound to accept testimony even when uncontradicted, if it is "palpably improbable", particularly when related to persons who have died. Moreen v. Estate of Carlson, 365 Ill. 482; Faulkner v. Black, 378 Ill. 112; Meggison v. Meggison, 367 Ill. 168, 180; Keshner v. Keshner, 376 Ill. 354, 363.



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represented a client who had received a gift; that there were no  
to the public administrator's office and told Mr. Rubens that he  
that he returned it to Outler and told him to keep it; that he went over



The appellants suggest Lindstrom was mentally incompetent to make a gift of this kind at the time in question. The disease from which he suffered (cancer) was a cruel one and to alleviate his sufferings morphine and magnesium sulphate were administered. The testimony of his physician is to the effect he was mentally competent, and no contrary medical testimony was offered. Moreover, his intention to give what he had to Cutler appears from the two statements made by him in his own handwriting and which he describes as "My Will" which, at the time of the making, he evidently regarded as the equivalent of a will. These, while not controlling are persuasive.

The proof of delivery of the savings deposit book with the verbal expressions recited above as to the desire of the deceased to give it to Cutler were sufficient under the holdings of this court to constitute a gift. In re Estate of Antkowski, 286 Ill. App. 184. Not only is the evidence submitted by claimant here sufficient to establish the gift, but we think the evidence submitted by the public administrator also tends to corroborate it. It shows that John Lindstrom was the illegitimate son of a woman in Sweden, who gave birth to two other illegitimate children, one a boy and the other a girl, neither of them, however, by the same father as John Lindstrom. [Afterwards she had a legitimate daughter one of the heirs as found by this court.] Taking her younger son with her, she went to Denmark, and then to America, practically abandoning John Lindstrom, leaving him with a family named Anderson when he was twelve years of age. There is no credible evidence that John Lindstrom ever did anything to indicate he considered these "heirs" as his relatives. The mother has been dead many years. After the death of John Lindstrom and after it appeared he owned considerable property, the Swedish consul in Chicago sent the following cable to the Swedish cabinet in Stockholm: "Chicago, November 6, 1941. 115 John Lindstrom, born May 26, 1872, died here July 23rd, leaving a considerable estate. Mother's name Charlotta. The names K. J. Lindstrom Gustafson, Alnoe, Victor Landgren, Vaespervik is mentioned leaving some notes. Examine into the question of heirship and telegraph the result." The foreign department caused the fact of death to be announced over the radio in Sweden "requesting relatives to make themselves known. " A supposed cousin in Sweden wrote to a cousin in

The expert's report on the handwriting was mostly inconclusive as to the  
gift of this kind at the time in question. The witness is a witness  
he suffered (conviction) was a criminal one and to assist in his testimony  
morphine and cocaine and other drugs were administered. The testimony of his  
physician is to the effect that he was mostly unconscious, and as a consequence  
medical testimony was offered. However, the intention to give was not  
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John Lindstrom, born May 25, 1875, died June 15, 1901, leaving a con-  
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be an answer over the cable in a letter "requesting relatives to make  
themselves known." A second cable in Swedish words to a consul in



Hartland, Wisconsin, and she in turn notified these persons who lived in Salt Lake City, Utah, after 1901.

Gustave Vilhelm Lindstrom the other illegitimate son testified that he had never seen the deceased in the United States. He came to America with his mother in 1865 and lived with her until he was about 14 years of age. She died June 16, 1926, at Salt Lake City. She was born April 16, 1849; he on April 23, 1874. The last time this witness had seen his deceased brother was when the brother was 11 years of age and the witness 9. They were on the docks at Sundsvall, Sweden, prior to the mother and the witness leaving for Denmark. This brother makes a favorable impression as a witness, but his testimony, considered with all its inferences, tends to corroborate the claimant's case by showing that the gift he made to the plaintiff just prior to his death was reasonable and probable.

From the uncontradicted evidence we think it a fair and just inference that deceased had ceased to know, or at least care, anything for these "heirs". Probably they were the last persons on earth to whom he would have wished to give his estate. Under all the circumstances, the gift made was probable and consistent. The evidence is uncontradicted. The witnesses are credible and unimpeached. The claimant could not testify. The judge of the Probate Court and the judge of the Circuit Court were constrained to the same conclusion we have felt compelled to adopt. We hold the evidence sufficient to establish the gift causa mortis of this estate by John Lindstrom to Charles Cutler, the claimant, as alleged in his petition. It will therefore be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.



AFFIRMED.

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42607

NATHAN FINDER,

Appellee,

v.

MORRIS MILLER & CO., INC., a corporation,

Appellant.

320 I.A. 380

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 14, 1942, plaintiff caused judgment by confession to be entered against defendant on three promissory notes. These notes contain power to confess judgment for any amount due. Two of the notes were for the principal amount of \$275, the third for the sum of \$350. Each and all were drawn to the order of plaintiff; each and all were dated February 15, 1935, and each and all by their terms drew interest at the rate of 6% per annum from date.

These three notes were executed and delivered as a part of a series of ten notes of the same date, executed to the order of plaintiff for the total sum of \$2,200 on February 15, 1935, for a loan of \$2,000 made by plaintiff to the defendant corporation on that date. The loan and execution of the notes were authorized by the Board of Directors of the defendant corporation February 13, 1935, and on the same date the Board also authorized the assignment of a leasehold held by defendant to secure payment of the notes. This assignment was executed and delivered to plaintiff by defendant at the same time.

On an affidavit made in behalf of the defendant corporation to the effect that these three notes were in fact fully paid, a trial on the merits was allowed. The trial was by the court, without a jury, and the finding was that on the date the judgment was entered the amount thereof was due on the notes and that said judgment should



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On 11-21-1914, the defendant made in behalf of the defendant corporation to the effect that these three notes were in fact fully paid, a trial on the merits was allowed. The trial was by the court, without a jury, and the finding was that on the date of the judgment was entered the amount thereof was due on the notes and that said judgment should



2.

stand. The items constituting the amount of the judgment were the principal amounts of the three notes: \$275, \$275 and \$350, a total of \$900, interest thereon from February 15, 1935, to July 14, 1942, at 6%, \$400, and attorneys' fees of \$145, making the total sum of \$1,445, with costs.

Plaintiff had possession of the three notes uncanceled and the assignment of the lease given to secure the payment thereof. He offered these in evidence. This cast on defendant the burden of proving payment of the notes.

When the transaction of February 15, 1935, took place Morris Miller was President of the defendant corporation. He died July 4, 1941. The defendant undertook to prove that these three notes were paid in full by defendant to plaintiff with three checks of defendant, one dated November 30, 1935, another dated January 11, 1936, and a third dated April 30, 1936. These checks are in evidence as defendant's exhibits Nos. 4, 5 and 6. These checks are for the sums respectively of \$287.38, \$288.75 and \$357. There is no dispute that plaintiff received from defendant these checks and cashed them. Further, there is no dispute that Nos. 1 to 7 of the series of ten notes executed and delivered by defendant to plaintiff on February 15, 1935, have been paid/<sup>canceled</sup> and surrendered to defendant. The contention of plaintiff, however, is that these three payments were rightfully made and applied not on the notes upon which judgment was entered but on notes given when another loan was made by plaintiff to defendant in September, 1935, before the maturities of these last three notes of the first series. This alleged loan is represented by two checks, which are in evidence as plaintiff's exhibits Nos. 1 and 2. No. 1 is the check of plaintiff to the order of defendant for the sum of \$200, dated September 4, 1935, apparently cashed by defendant the following day. No. 2 is also the check of plaintiff to the order of defendant, dated September 19, 1935, for \$600, also cashed by defendant on the following day. The bookkeeper testified to the receipt of the proceeds of these

stand. The items constituting the amount of the judgment are the principal amounts of the three notes: \$275, \$275 and \$250, a total of \$800, interest thereon from February 12, 1935, to July 14, 1942, at 6%, \$400, and attorneys' fees of \$145, making the total sum of \$1,445, with costs.

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3.

checks by defendant. Plaintiff did not keep any books. Plaintiff testified to the execution of these checks at the request of Miller . He also testified that he received from Miller for the two checks three notes of the corporation for the total principal amount of \$900. He also testified as to conversations he had with Miller at these times, but the conversations were on motion of defendant stricken by the court, relying on Helbig v. Citizens Ins. Co., 234 Ill. 251, cited with approval in Lueth v. Goodknecht, 345 Ill. 197, 201. Although the conversations between Miller and plaintiff were stricken, there was evidence in the record from which the trial court could find that the transaction amounted to a loan and that notes of the defendant corporation were given by Miller to plaintiff for the sums of money advanced to him. The cash book of defendant shows the receipt of \$200 by defendant on September 4, 1935, and also the receipt of \$600 on September 19, 1935. The ledger, admitted in evidence without objection, has a notation by the Bookkeeper, Mr. Marreck, made by him at the request of Miller, which indicates that the transaction was an exchange of checks, which Marreck says was not an unusual business transaction. The notation was made by direction of Mr. Miller but the corresponding check or checks could not be found by Mr. Marreck after a diligent search of defendant's files. It does not appear that any inquiry was made at defendant's bank, where it should have been possible to find such evidence if the transaction had been of that character.

Bernard Miller, son of the former president, testifying as to the three checks said that he had seen them; that they were a part of the Finder file and attached to certain notes. What notes were attached thereto in the file is not made to appear, and this was evidence in the possession of defendant. There is no evidence as to whether these checks were delivered to plaintiff personally or sent to him by mail. In fact, defendant's evidence falls short of showing that these checks were given in payment of the particular obligation sued on. 11 C. J. S. 101, §662.

As the trial approached its end, the trial court suggested



As the first group began to sing, the second group joined in.

4.

defendant's former bookkeeper, Mr. Marreck, should have an opportunity to discover the cancelled checks supposed to have been taken in exchange for these checks of plaintiff. Attorney for plaintiff approved the suggestion, and the court asked Mr. Marreck whether he thought he could do it. Mr. Marreck said that he would have to go over the old files. The court said: "If I understood you, you said you could either find the cancelled checks or the cash disbursements". Mr. Marreck replied, "Yes". Hearing of the case was then adjourned. At a later hearing Mr. Mareck testified he had made the effort to locate the books and records of the defendant corporation in support of his testimony to the effect that these were exchange checks, as Mr. Miller had directed him to note. Mr. Marreck then testified he found the particular item of \$200 received by defendant September 4, 1935, and a deposit of \$600 on September 27, 1935. On cross-examination, however, he said: "So far as I know, even if I had followed the regular course of procedure, my search does not disclose the repayment of these two items in any way."

This testimony seems to have been decisive with the trial court. Apparently the court was of the opinion that the transaction was not an exchange of checks but a loan of money. If it was, then so far as this record shows the plaintiff had a right to apply the proceeds of the three checks defendant afterwards made to this later indebtedness. Liese v. Hentze, 326 Ill. 633, 639. If these payments were so right-fully applied, the notes here sued on have not been paid.

Our doubt in this case arises out of the unusual fact that there is in this record no claim or proof by plaintiff that he made any demand for payment of these uncanceled notes from the time the same became due until the beginning of this suit. Suit on the notes is not barred by any Statute of Limitations and no claim of such defense is made. Defendant has plausibly contended that the lapse of time without demand for payment might raise a presumption that the debt



defendant's former bookkeeper, Mr. Marreck, should have an opportunity to discover the cancelled checks supposed to have been taken in exchange for these checks of plaintiff. Attorney for plaintiff approved the suggestion, and the court asked Mr. Marreck whether he thought he could do it. Mr. Marreck said that he would have to go over the old files. The court said: "If I understood you, you said you could either find the cancelled checks on the cash disbursements." Mr. Marreck replied, "Yes". Hearing of the case was then adjourned. At a later hearing Mr. Marreck testified he had made the effort to locate the books and records of the defendant corporation in support of his testimony to the effect that these were exchange checks, as Mr. Miller had directed him to note. Mr. Marreck then testified he found the particular item of \$200 received by defendant September 4, 1935, and a deposit of \$500 on September 27, 1935. On cross-examination, however, he said: "So far as I know, even if I had followed the regular course of procedure, my search does not disclose the repayment of these two items in any way."

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5.

represented by the notes had been satisfied. We approved this principle in First National Bank v. Simon, 312 Ill. App. 214. Plaintiff was not asked to explain his failure to request payment of the notes. The fact of this second loan however, creates an unusual situation. In the absence of directions by the defendant, of which there is no proof, plaintiff would have the right to apply the payments upon the debt for which he did not hold security rather than on the one represented by notes for which he held security and would naturally and probably do so.

The trial court, who saw and heard the witnesses, found that payment of the indebtedness for which suit was brought had not been proved. The finding of the trial court has the same weight in this court as the verdict of a jury. The question for our decision is whether his finding is clearly and manifestly contrary to the evidence. We cannot so hold on this record. The judgment of the trial court will therefore be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

42617

320 I.A. 361

LEO A. RYAN, Administrator of the  
Estate of Chauncey Esch, Deceased,  
Appellee,

v.

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY, a Corporation,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause was before this court on a former appeal by the plaintiff. Ryan v. Chicago & North Western Ry. Co., 315 Ill. App. 65. There it appeared the trial court, on facts substantially like those which appear in this record, at the close of all the evidence directed the jury to return a verdict for the defendant and entered judgment on it. The theory of the trial court was that at the time deceased was injured he was a mere licensee on the premises of the defendant railway, and from a legal standpoint the only obligation of the defendant was not to injure him wantonly and wilfully. The complaint charged both general negligence and wanton conduct. It is unnecessary to state at length what was said in the former opinion. We quoted a paragraph from the opinion of the Supreme Court in Neice v. Chicago & A. R. Co., 254 Ill. 595, as follows:

"To run a train in the night time over unlighted station grounds without a headlight, and without any warning by bell or whistle, along a platform where persons may reasonably be expected to be, is evidence tending to prove a wanton and reckless disregard of the safety of such persons. In such a case it is not necessary that there should be specific knowledge of an individual on the track or platform or specific ill-will toward or an intention to injure an individual." The judgment was affirmed." We added:

"In the instant case, if, as the testimony tends to show, defendant's brakeman in charge of its train was not at his place of duty and ran the train without a headlight, and with-



3201A.301

1917

EDWARD A. RYAN, Administrator of the  
Estate of CHARLES RYAN, Deceased,  
Appellee,

v.

CHICAGO AND NORTH WESTERN RAILWAY  
COMPANY, a Corporation,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause was before this court on a former appeal by the  
plaintiff. Ryan v. Chicago & North Western Ry. Co., 215 Ill. App. 66.  
There it appeared the trial court, on facts substantially like those  
which appear in this record, set aside of all the evidence directed  
the jury to return a verdict for the defendant and entered judgment  
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railway, and from a legal standpoint the only obligation of the  
defendant was not to injure him wantonly and wilfully. The complaint  
charged both general negligence and wanton conduct. It is unnecessary  
to state at length what was said in the former opinion. We quoted a  
paragraph from the opinion of the Supreme Court in Heide v. Chicago &  
A. R. Co., 254 Ill. 535, as follows:

"To run a train in the right time over un-  
lighted station grounds without a headlight,  
and without any warning by bell or whistle,  
along a platform where persons may reasonably  
be expected to be, is evidence tending to  
prove a wanton and reckless disregard of the  
safety of such persons. In such a case it is  
not necessary that there should be specific  
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ment was affirmed." We added:

"In the instant case, if, as the testimony  
tends to show, defendant's brakeman in charge  
of the train was not at his place of duty and with-  
ran the train without a headlight, and with-

out warning by whistle or otherwise, upon approach to this station, then following the Neice case and assuming the deceased was a mere licensee, we hold plaintiff would be entitled to have submitted to the jury the question of whether defendant was wantonly negligent. However, we hold the decedent was neither trespasser nor mere licensee but was rightfully on defendant's right-of-way, when injured, upon business which required his presence there, and that defendant was obligated to the use of reasonable care not to injure him. There was evidence from which the jury could find the defendant was not in the exercise of due care. There was also the question of whether defendant under all the circumstances was negligent, but these questions were for the jury."

The evidence in this record, we hold, is not materially different from that given on the former trial. Defendant again as formerly argues the deceased was a mere licensee and the defendant's only duty was not to wantonly injure him. We adhere to our former decision and hold that there is sufficient evidence to go to the jury under either count of the complaint.

It is urged now that the court erred in receiving and rejecting evidence. The elevated structure on which defendant built and ran its railway was constructed in conformity with an ordinance of the Village of Oak Park, which provided that the operation of defendants trains should not be subject to the village safety ordinances. These ordinances also provided it should be unlawful for any person to walk over or across the elevated structure at any place. This was alleged in defendant's pleading and not denied by plaintiff. On the trial defendant offered to prove these provisions of the ordinances. The offer was rejected by the court; we think properly. The suit was not based on this or any other ordinance. The ordinances were wholly immaterial and the court, we hold did not err in this respect.

It is also urged the court erred in allowing the evidence of Joseph McCombs given on the former trial to be read in evidence. Brownlie v. Brownlie, 351 Ill. 72, is relied on but we think it is not applicable. It appeared from the evidence of his parents that this witness had been inducted into the United States Army on January 5,



out warning by whistle or otherwise, upon approach to this station, then following the same case and assuming the deceased was a mere licensee, we hold plaintiff would be entitled to have admitted to the jury the question of whether defendant was wantonly negligent. However, we hold the deceased was neither trespasser nor mere licensee but was rightfully on defendant's right-of-way, when injured, upon business which required his presence there, and that defendant was obligated to the use of reasonable care not to injure him. There was evidence from which the jury could find the defendant was not in the exercise of due care. There was also the question of whether defendant under all the circumstances was negligent, but these questions were for the jury."

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It is urged how that the court erred in receiving and rejecting evidence. The elevated structure on which defendant built and ran its railway was constructed in conformity with an ordinance of the Village of Oak Park, which provided that the operation of defendant's trains should not be subject to the village safety ordinances. These ordinances also provided it should be unlawful for any person to walk over or across the elevated structure at any place. This was alleged in defendant's pleading and not denied by plaintiff. On the trial defendant offered to prove these provisions of the ordinance. The offer was rejected by the court; we think properly. The suit was not based on this or any other ordinance. The ordinances were wholly immaterial and the court, we hold did not err in this respect.

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3.

1942, that he was a mechanic in the Army Air Corps, and when last heard from was about to be sent out any time for foreign service. He had asked his parents not to write to him until they heard from him. The place he was to be sent over seas the court would know was a military secret, which could not be properly disclosed. We hold the court did not err under these facts in permitting the former testimony to be read to the jury.

It is also urged in behalf of the defendant that the court erred in giving instructions on behalf of the plaintiff and in refusing to give instructions on behalf of defendant. We have examined the instructions refused and given and hold there was no reversible error in this respect.

In behalf of the plaintiff the court submitted to the jury a special interrogatory as to whether the train of defendant, at the time and place in question, was wilfully and wantonly operated so as to cause the same to strike plaintiff's intestate, throwing him to and upon the ground and under the wheels of the train, inflicting injuries upon him from which he died. The jurors signed but neglected to answer the interrogatory "Yes" or "No". It is urged that because of this neglect of the jury, it was error for the court to enter judgment on the general verdict. There were counts charging both general and wanton negligence. The interrogatory was given at the request of the plaintiff. We hold defendant has no reason to complain on this ground.

The important question in this case, as we view it, is the legal one of whether the officer was on defendant's premises at the time he was killed of right or as a mere licensee. We have held he was there of right, and that defendant owed him the duty not to injure him either negligently or wantonly. The judgment will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

1942, that he was a mechanic in the Army Air Corps, and when last heard from was about to be sent out any time for foreign service. He had asked his parents not to write to him until they heard from him. The place he was to be sent over was the court would know was a military secret, which could not be properly disclosed. He held the court did not say under these facts in permitting the former testimony to be read to the jury.

It is also urged in behalf of the defendant that the court erred in giving instructions on behalf of the plaintiff and in refusing to give instructions on behalf of defendant. We have examined the instructions refused and given and hold there was no reversible error in this respect.

In behalf of the plaintiff the court submitted to the jury a special interrogatory as to whether the train of defendant, at the time and place in question, was willfully and wantonly operated so as to cause the same to strike plaintiff's intestate, throwing him to and upon the ground and under the wheels of the train, inflicting injuries upon him from which he died. The jurors agreed but neglected to answer the interrogatory "Yes" or "No". It is urged that because of this neglect of the jury, it was error for the court to enter judgment on the general verdict. There were counts charging both general and wanton negligence. The interrogatory was given at the request of the plaintiff. We hold defendant has no reason to complain on this ground.

The important question in this case, as we view it, is the legal one of whether the officer was on defendant's premises at the time he was killed or right or as a mere licensee. We have held he was there at right, and that defendant owed him the duty not to injure him either negligently or wantonly. The judgment will be affirmed.

AFFIRMED.



320 I.A. 361<sup>2</sup>

42629

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in error,

v.

FRANK EDELMAN,

Plaintiff in error.

ERRPR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant was tried on an information which charged that he "on the 2nd day of October, 1942, at the City of Chicago, County of Cook and State of Illinois, aforesaid, unlawfully, intentionally, and maliciously, did, then and there, unlawfully, willfully, wickedly, maliciously and scandalously have in his possession certain lewd, wicked, scandalous obscene immoral books and literature to the manifest corruption of public morals in contempt of the people and the law, to the evil example of all persons, in violation of Paragraph 468, Chapter 38, Illinois Revised Statutes, 1941, and Smith-Hurd Illinois Annotated Statutes for the year 1941, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois."

The record shows that the information was filed, defendant taken into custody and that on motion of the State trial was set for October 21, 1942. A motion was made by defendant to suppress certain evidence which it was averred had been unlawfully seized. On November 18, 1942, before Judge Joseph B. Hermes, defendant was arraigned, pleaded not guilty, demanded a jury, and the trial was set for November 30, 1942. On the same day defendant made a motion to withdraw the plea of not guilty, which was denied, and his motion to suppress evidence was also denied. The trial was set for December 9, 1942, and afterwards for December 14, 1942. Defendant waived



3231A.361

42822

THE PEOPLE OF THE STATE OF  
ILLINOIS,  
Defendant in error,  
v.  
FRANK EDELMAN,  
Plaintiff in error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant was tried on an information which charged that he "on the 2nd day of October, 1942, at the City of Chicago, County of Cook and State of Illinois, aforesaid, unlawfully, intentionally, and maliciously, did, then and there, unlawfully, wilfully, wickedly, maliciously and scandalously have in his possession certain lewd, wicked, scandalous obscene immoral books and literature to the manifest corruption of public morals in contempt of the people and the law, to the evil example of all persons, in violation of paragraph 488, Chapter 32, Illinois Revised Statutes, 1941, and Smith-Hurd Illinois Annotated Statutes for the year 1941, contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the State of Illinois."

The record shows that the information was filed, defendant taken into custody and that on motion of the State trial was set for October 21, 1942. A motion was made by defendant to suppress certain evidence which it was averred had been unlawfully seized. On November 18, 1942, before Judge Joseph H. Newman, defendant was arraigned, pleaded not guilty, demanded a jury, and the trial was set for November 30, 1942. On the same day defendant made a motion to withdraw the plea of not guilty, which was denied, and his motion to suppress evidence was also denied. The trial was set for December 9, 1942, and afterwards for December 14, 1942. Defendant waived

2.

jury trial. The cause was tried by the court without a jury, and the court, after hearing the testimony of the witnesses and the argument of counsel, found "the defendant guilty in manner and form as charged in the information herein".

An application of defendant for probation was denied December 29, 1942. Defendant moved for a new trial. The motion was overruled. There was a motion in arrest of judgment, which was also overruled. Judgment was entered, and defendant was sentenced to confinement in the County Jail for six months. There was a motion of defendant to vacate the judgment entered and overruled a stay of mittimus for 60 days, with bill of exceptions to be filed in 90 days. Neither bill of exceptions nor report of proceedings are, however, found in the record. The matter is before us on the common law record.

It is contended for reversal that the information failed to allege any crime whatever and that the court, therefore, never acquired jurisdiction. Section 6 of Division 11 of the Criminal Code provides in substance that it shall be sufficient if the offense is charged in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. This information under this provision of the statute would seem to be sufficient, since it charges that the offensive matter was in the defendant's possession. Defendant, however, relies on McNair v. People, 89 Ill. 441, 444, where it was said that notwithstanding the statute the majority of the court were of the opinion it was necessary to set out the supposed obscene matter in <sup>the</sup> indictment, unless it was in the hands of defendant or out of the power of the prosecution or too gross to be spread on the records of the court, in either of which cases the existence of the fact excusing setting it out should be alleged in the indictment. The indictment in the McNair case was for printing and giving away and having in possession obscene matter. Here the gist of it is for possession with unlawful intent. The cases are, therefore, distinguishable. There was also in the McNair case a motion by defendant to quash the indictment. No such motion



jury trial. The cause was tried by the court without a jury, and the court, after hearing the testimony of the witnesses and the argument of counsel, found "the defendant guilty in manner and form as charged in the information herein".

An application of defendant for probation was denied December 20, 1942. Defendant moved for a new trial. The motion was overruled. There was a motion in arrest of judgment, which was also overruled. Judgment was entered, and defendant was sentenced to confinement in the County Jail for six months. There was a motion of defendant to vacate the judgment entered and overrule a stay of writs for 60 days, with bill of exceptions to be filed in 30 days. Neither bill of exceptions nor report of proceedings are, however, found in the record. The matter is before us on the common law record.

It is contended for reversal that the information failed to allege

any crime whatever and that the court, therefore, never acquired jurisdiction. Section 8 of Division II of the Criminal Code provides in substance that it shall be sufficient if the offense is charged in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury. This information under this provision of the statute would seem to be sufficient, since it charges that the offensive matter was in the defendant's possession. Defendant, however, relies on Kearney v. People, 89 Ill. 441, 444, where it was said that notwithstanding the statute the majority of the court are of the opinion it was necessary to set out the supposed obscene matter in the indictment, unless it was in the hands of defendant or out of the power of the prosecution or too gross to be spread on the records of the court, in either of which cases the existence of the fact excusing setting it out should be alleged in the indictment. The indictment in the Kearney case was for printing and giving away and having in possession obscene matter. Here the gist of it is for possession with unlawful intent. The cases are, therefore, distinguishable. There was also in the Kearney case a motion by defendant to quash the indictment. No such motion



3.

appears in this record. Defendant cites People v. Brady, 272 Ill. 422, as quoting McNair v. People with approval. An examination of the case, however, discloses that the citation was made in the dissenting opinion filed in that case. In this matter we are impressed by the remarks of Chief Justice Scates in Gannady v. People, 17 Ill. 158:

"These great niceties, and the strictness in pleading, should only be countenanced and supported, when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparation for his defense, for want of greater certainty or particularity in the charge."

It is undoubtedly the law that an information or indictment which fails to charge a crime will not sustain a judgment against the defendant and will be reversed on writ of error. People v. Buffe, 318 Ill. 384. However, we hold the decision of the Supreme Court in the case of Fuller v. People, 92 Ill. 182, is decisive here. It was there held an indictment charging defendant had in his possession a certain indecent drawing was sufficient.

Defendant also argues the information is defective because it fails to allege defendant had knowledge of the obscenity of the books in his possession. On this point he relies on Moens v. United States, 267 Fed. 317, where the court said that under the indictment there considered a blind man, having pictures in his possession without knowledge of their nature and for the purpose of exhibiting them to others, could be convicted under the information, which was, therefore, held defective. We are inclined to the view that even a blind man would not be presumed to be ignorant of the nature of the books which he had in his possession for the purpose of disposing of them to others. However that may be, we hold that the language of the information in this case does in effect allege knowledge on the part of the defendant, in that his unlawful act is expressly charged by the information to have been done "intentionally". If his possession of these obscene books was intentional, then he must have had knowledge or scienter. The remarks of Chief Justice Scates, already cited, are again applicable.

appears in this record. Defendant cites People v. Brady, 275 Ill. 431, as quoting Mohr v. People with approval. An examination of the case,

however, discloses that the citation was made in the dissenting opinion filed in that case. In this matter we are impressed by the remarks of Chief Justice Seates in Gennady v. People, 14 Ill. 188:

"These great niceties, and the subtleties in pleading, should only be countenanced and supported, when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparation for his defense, for want of greater certainty or particularity in the charge."

It is undoubtedly the law that an information or indictment which fails to charge a crime will not sustain a judgment against the defendant and will be reversed on writ of error. People v. White, 318 Ill. 384. However, we hold the decision of the Supreme Court in the case of Euler v. People, 92 Ill. 182, is decisive here. It was there held an indictment charging defendant had in his possession a certain innocent drawing was sufficient.

Defendant also argues the information is defective because it fails to allege defendant had knowledge of the obscenity of the books in his possession. On this point he relies on Moore v. United States, 287 Fed. 217, where the court said that under the indictment there considered a blind man, having pictures in his possession without knowledge of their nature and for the purpose of exhibiting them to others, could be convicted under the information, which was, therefore, held defective. We are inclined to the view that even a blind man would not be presumed to be ignorant of the nature of the books which he had in his possession for the purpose of disposing of them to others. However that may be, we hold that the language of the information in this case goes in effect to allege knowledge on the part of the defendant in that his unlawful act is expressly charged by the information to have been done "intentionally". If his possession of these obscene books was intentional, then he must have had knowledge or scienter. The remarks of Chief Justice Seates, already cited, are again applicable.

4.

Defendant also contends the judgment against him should be reversed because the common law record does not recite that he was duly advised of his right to a jury trial, and says that the court was therefore without jurisdiction to sentence him. This is an unusual contention to make on this record. The abstract shows that on November 18, 1942, defendant pleaded not guilty and demanded a jury trial; that later, on December 14, 1942, he waived the trial by jury. We hesitate to hold that a defendant, where the record, as here, shows he had counsel, at one time demanded a jury trial and at another waived it, was not informed properly of his rights in that respect. Every presumption in the absence of a bill of exceptions is in favor of the judgment and the transcript of the record imports verity. Pulliam v. People, 352 Ill. 320. The judgment of the Municipal Court will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.



Defendant also contends the judgment against him should be reversed because the common law record does not recite that he was duly advised of his right to a jury trial, and says that the court was therefore without jurisdiction to sentence him. This is an unusual contention to make on this record. The abstract shows that on November 18, 1942, defendant pleaded not guilty and demanded a jury trial; that later, on December 14, 1942, he waived the trial by jury. We hesitate to hold that a defendant, where the record, as here, shows he had counsel, at one time demanded a jury trial and at another waived it, was not informed properly of his rights in that respect. Every presumption in the absence of a bill of exceptions is in favor of the judgment and the transcript of the record imports verity. William v. People, 352 Ill. 320. The judgment of the Municipal Court will be affirmed.

AFFIRMED.

O'Connor, J., and Niemeyer, J., concur.

42597

320 I.A. 362<sup>1</sup>

ARMIN F. HILLMER, et al.,  
Plaintiffs

v.

CHICAGO BANK OF COMMERCE, an  
Illinois Banking Association,  
et al.,  
Defendants.

ARMIN F. HILLMER, GEORGE LEONARD  
and GORDON LEONARD, Co-partners  
Practicing Law as Leonard and Leonard,  
and GEORGE E. LEONARD,  
Petitioners-Appellants,

v.

KARL E. SEYFARTH,  
Respondent-Appellee.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Armin F. Hillmer, plaintiff, and George (E.) Leonard and Gordon Leonard, co-partners practicing law as Leonard and Leonard, and George E. Leonard (formerly of the law firm of Seyfarth and Leonard) appeal from orders of the Superior court of Cook county entered October 29 and December 15, 1942 denying successive petitions for an order directing the receiver herein to pay to one of the petitioners one-half of certain sums theretofore allowed as attorneys' fees in this case and held by the receiver under certain orders of court.

The petitioner George E. Leonard and respondent Karl Edwin Seyfarth were practicing law under the firm name of Seyfarth and Leonard until July 1, 1935, when by agreement the partnership was dissolved. Provision was made for the respective partners to render services in the unfinished cases and there was a requirement that each pay to the other one-half of the fees collected, render monthly statements and permit examination of the files in any of the cases.

320 I.A. 882

42507

ARMIN F. HILLMER, et al.,  
Plaintiffs

CHICAGO BANK OF COMMERCE, and  
Illinois Banking Association,  
et al.,  
Defendants.

ARMIN F. HILLMER, GEORGE LEONARD  
and GORDON LEONARD, Co-partners  
Practicing Law as Leonard and Leonard,  
and GEORGE E. LEONARD,  
Petitioners-Appellants,

KARL E. SEYFARTH,  
Respondent-Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Armin F. Hillmer, plaintiff, and George (E.) Leonard and  
Gordon Leonard, co-partners practicing law as Leonard and Leonard,  
and George E. Leonard (formerly of the law firm of Seyfarth and  
Leonard) appeal from orders of the Superior Court of Cook County  
entered October 29 and December 15, 1942 denying successive petitions  
for an order directing the receiver herein to pay to one of the  
petitioners one-half of certain sums theretofore allowed as attorneys'  
fees in this case and held by the receiver under certain orders of  
court.

The petitioner George E. Leonard and respondent Karl Edwin  
Seyfarth were practicing law under the firm name of Seyfarth and  
Leonard until July 1, 1935, when by agreement the partnership was  
dissolved. Provision was made for the respective partners to render  
services in the unfinished cases and there was a requirement that  
each pay to the other one-half of the fees collected, render monthly  
statements and permit examination of the files in any of the cases.



2.

This court has held that this agreement did not terminate the partnership and that each partner retained an interest in all cases handled by the other. (Seyfarth v. Leonard, 316 Ill. App. (abst.) 139.)

A dispute having arisen, an order was entered August 7, 1940, directing "that the Receiver herein (and any successor thereto) retain and hold any sum or sums of money allowed herein as attorneys' fees to Seyfarth & Leonard, Seyfarth & Atwood, Leonard & Leonard, or to any member of said firms, until Karl Edwin Seyfarth and George Edward Leonard agree as to the division of said fees or until their rights therein under the agreement to liquidate the law firm of Seyfarth & Leonard have been fully adjudicated by a court of record and until an order be entered herein authorizing the payment thereof." Thereafter, by orders entered September 23, 1940, January 22, 1942 and July 29, 1942, fees totaling approximately \$40,000 were allowed and ordered to be held by the receiver under the conditions of the order of August 7, 1940. By agreement of Seyfarth and Leonard \$1,900 was disbursed, leaving about \$38,000, the subject of the present controversy.

March 28, 1941 Seyfarth brought suit in the Superior court for an accounting and discovery, alleging his full compliance with the liquidation agreement of July 1, 1935 and charging Leonard with defaults in his obligations thereunder. That cause is pending before the master.

May 7, 1942, the plaintiff Hillmer filed a petition reciting the entry of the orders of August 7, 1940, September 23, 1940 and January 22, 1942, and claiming that in the action for accounting mentioned above, Seyfarth admitted the right of Leonard & Leonard to one-half of the fees held under the two last mentioned orders, and that the withholding of the fees will unnecessarily and unduly impede the prosecution of this case. Respondent Seyfarth answered, denying Hillmer's construction of his complaint.

Seyfarth procured the appointment of a receiver in the accounting suit to take possession and hold certain fees specifically mentioned, and such other sums as have been collected since May 2, 1941 or shall

This court has held that this agreement did not terminate the partnership and that each partner retained an interest in all cases handled by the other. (Geylert v. Leonard, 216 Ill. App. (2d) 129.)

A dispute having arisen, an order was entered August 7, 1940, directing "that the Receiver herein (and any successor thereto) retain and hold any sum or sums of money allowed herein as attorneys' fees to Geylert & Leonard, Geylert & Atwood, Leonard & Leonard, or to any member of said firms, until Karl Edwin Geylert and George Edward Leonard agree as to the division of said fees or until their rights therein under the agreement to liquidate the law firm of Geylert & Leonard have been fully adjusted by a court of record and until an order be entered herein authorizing the payment thereof." Thereafter, by order entered September 28, 1940, January 22, 1942 and July 22, 1942, fees totaling approximately \$40,000 were allowed and ordered to be held by the receiver under the conditions of the order of August 7, 1940. By agreement of Geylert & Leonard and Leonard & Leonard, leaving about \$28,000, the subject of the present controversy.

March 28, 1941 Geylert brought suit in the Superior Court for an accounting and discovery, alleging his full compliance with the liquidation agreement of July 1, 1935 and charging Leonard with default in his obligations thereunder. That cause is pending before the master.

May 7, 1942, the plaintiff Miller filed a petition reciting the entry of the order of August 7, 1940, September 22, 1940 and January 22, 1942, and claiming that in the action for accounting mentioned above, Geylert admitted the right of Leonard & Leonard to one-half of the fees held under the two last mentioned orders, and that the withholding of the fees will unnecessarily and unduly impede the prosecution of this case. Respondent Geylert answered, denying Miller's contention of his complaint.

Geylert procured the appointment of a receiver in the accounting suit to take possession and hold certain fees specifically mentioned, and such other sums as have been collected since May 2, 1941 or shall



3.

thereafter be collected by the parties. On appeal that order was modified by this court in the above mentioned opinion, filed October 2, 1942, whereby the proceedings were remanded "with directions to limit the authority of the receiver to the collection of the portion of the fees claimed by plaintiff, except as to those fees now in the hands of other receivers, (the amount in controversy here) who, the record shows, will hold such fees until this cause (the accounting suit) is terminated."

October 29, 1942, Hillmer amended and supplemented his petition by alleging the entry of an order herein for \$7,150 additional fees, to be held as aforesaid, and setting out the proceedings, including the opinion of this court in the matter of the appointment of the receiver in the accounting suit. He also amended the prayer of the petition to ask that the receiver be directed to pay to him as petitioner, or to George E. Leonard, one-half of the fees held by such receiver under the conditions of the order of August 7, 1940. The trial court denied the prayer of the petition as amended and supplemented.

November 27, 1942, the petitioners joined in a petition incorporating and referring to the former petition and setting out orders of November 23, 1942 in the accounting suit directing George Edward Leonard to pay to the receiver within five days one-half of certain fees collected by him in partnership cases and withheld from the receiver. The prayer of this petition is that the order of October 29, 1942 be vacated and set aside and that, without regard to action taken as to said order, an order be entered directing the receiver to pay to Hillmer, Leonard & Leonard or George E. Leonard, one-half of the fees theretofore allowed in this case. Respondent Seyfarth answered, asserting a vested contractual right in all fees held by the receiver herein until final adjudication or agreement as to the division thereof. On December 15, 1942 the chancellor denied the second petition. From these orders denying the relief prayed for, petitioners appeal.



thereafter be collected by the parties. On appeal that order was modified by this court in the above mentioned opinion, filed October 2, 1942, whereby the proceedings were remanded "with directions to limit the authority of the receiver to the collection of the portion of the fees claimed by plaintiff, except as to those fees now in the hands of other receivers, (the amount in controversy here) who, the record shows, will hold such fees until this cause (the accounting suit) is terminated."

October 29, 1942, Hillmer amended and supplemented his petition by alleging the entry of an order herein for \$7,150 additional fees, to be held as aforesaid, and setting out the proceedings, including the opinion of this court in the matter of the appointment of the receiver in the accounting suit. He also amended the prayer of the petition to ask that the receiver be directed to pay to him as petitioner, or to George E. Leonard, one-half of the fees held by such receiver under the conditions of the order of August 7, 1940. The trial court denied the prayer of the petition as amended and supplemented.

November 27, 1942, the petitioners joined their petition incorporating referring to the former petition and setting out orders of November 22, 1942 in the accounting suit directing George Edward Leonard to pay to the receiver within five days one-half of certain fees collected by him in partnership cases and withheld from the receiver. The prayer of this petition is that the order of October 29, 1942 be vacated and set aside and that, without regard to action taken as to said order, an order be entered directing the receiver to pay to Hillmer, Leonard & Leonard or George E. Leonard, one-half of the fees theretofore allowed in this case. Respondent's reply thereto, asserting a vested contractual right in all fees held by the receiver herein until final adjudication or agreement as to the division thereof. On December 15, 1942 the chancellor denied the second petition. From these orders denying the relief prayed for, petitioners appeal.

Seyfarth has filed a motion to dismiss the appeal because, as he says, the orders sought to be reviewed are not final and appealable. The parties agree that the order of August 7, 1940 fixing the conditions under which fees to be allowed thereafter should be held and disbursed, as well as the subsequent orders allowing fees and directing that same be xxx held by the receiver under the terms of the order of August 7, 1940, are final and appealable orders, and so our courts have held. People v. Illinois State Bank, 312 Ill. 613; Wyman v. Hageman, 318 Ill. 64, 73. Petitioners have moved to vacate or modify these orders by an order directing that one-half of the fees held by the receiver be paid to Hillmer, Leonard & Leonard or George E. Leonard. Denial of the relief sought is not unlike denial of a motion to vacate a final judgment, and is appealable. City of Park Ridge v. Murphy, 258 Ill. 365; Keithley v. County of Clark, 206 Ill. App. 500; Cohn v. Bernstein, 205 Ill. App. (abst.) 325. The motion to dismiss the appeal is denied.

Petitioners contend that as to half of the fees held by the receiver and claimed by Leonard as his share, the stipulated alternatives for payment of said fees have been met, in that Seyfarth by his action has agreed and this court has adjudicated that one-half of the fees belong to Leonard. These contentions are based upon the accounting suit. In that suit Seyfarth complained that commencing June, 1939, Leonard had failed and refused to render statements concerning receipts and disbursements; that he had collected and retained to his account fees in the cases described in the liquidation agreement and that one-half of such fees belonged to him, Seyfarth, under that agreement; that in addition to the fees specifically mentioned in the complaint, he, Seyfarth, is informed and believes that Leonard has collected other fees, the amount of which is unknown and cannot be ascertained without discovery. The relief asked is an accounting and the appointment of a receiver to collect and receive the moneys therein specifically mentioned and all other sums which may be accounted for or



only mentioned and all other sums which may be accounted for or  
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without discovery. The relief asked is an accounting and the appoint-  
other fees, the amount of which is unknown and cannot be ascertained  
he, Seytath, is informed and believes that Leonard has collected  
that in addition to the fees specifically mentioned in the complaint,  
one-half of such fees belonged to him, Seytath, under that agreement;  
fees in the cases described in the liquidation agreement and that  
and disbursements; that he had collected and retained to his account  
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held by the receiver be paid to Hillmer, Leonard & Leonard or George E.  
or modify these orders by an order directing that one-half of the fees  
Lynn v. Harman, 318 Ill. 84, 73. Petitioners have moved to vacate  
our courts have held. People v. Illinois State Bank, 313 Ill. 613;  
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conditions under which fees to be allowed thereafter should be held  
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he says, the orders sought to be reviewed are not final and appealable.  
Seytath has filed a motion to dismiss the appeal because, as



5.

thereafter received by Leonard in connection with the liquidation of Seyfarth & Leonard, and that said receiver hold and distribute said money to the respective parties as their rights therein appear after a full accounting is adjudicated and determined by the court.

It is true, as contended by Leonard, that in the complaint Seyfarth claimed only one-half of the fees collected. He is not entitled to more and neither is Leonard. In a partnership neither partner has exclusive right to any part of the joint or partnership effects until a balance of accounts is struck between him and his co-partners and it is ascertained precisely what is the amount of his interest. Morrison v. Austin State Bank, 213 Ill. 472, 480; Cunningham v. Cunningham, 303 Ill. 41, 45. By the liquidation agreement the parties sought to anticipate the final settlement by allowing each to receive one-half of each fee as collected. Had both parties fully complied with the liquidation agreement each would have received his part of each fee, less proper deductions for expenses. Neither party intended that the other could withhold division of fees collected by him and insist upon one-half of the fees collected by his co-partner. That Seyfarth did not so intend is shown by his position here and in the accounting suit, where he asked that the receiver take possession of all, not half of the fees, and hold same until full accounting and adjudication. Leonard took a similar position there and in this case by insisting that, because of alleged defaults by Seyfarth under the liquidation agreement, he, Leonard, is entitled to have Seyfarth's share of the fees retained by the receiver until final adjudication of the rights of the parties. So far the record discloses no defaults on the part of Seyfarth. The orders of November 23, 1942 in the accounting suit show the withholding of fees collected by Leonard, and there is neither allegation nor proof of payment by him of the sums directed to be paid to the receiver. The offer to do equity is conditioned on the court supplying the money by granting the relief sought by petitioners. In this state of the record we cannot hold that Seyfarth has agreed that Leonard should receive one-half of the

thereafter received by Leonard in connection with the liquidation of Seyfarth & Leonard, and that said receiver hold and distribute said money to the respective parties as their rights therein appear after a full accounting is adjourned and determined by the court.

It is true, as contended by Leonard, that in the complaint Seyfarth claimed only one-half of the fees collected. He is not entitled to more and neither is Leonard. In a partnership neither partner has exclusive right to any part of the joint or partnership effects until a balance of accounts is struck between him and his co-partners and it is ascertained precisely what is the amount of his interest. Howison v. Austin State Bank, 213 Ill. 472, 480; Gunninham v. Gunninham, 303 Ill. 41, 45. By the liquidation agreement the

parties sought to anticipate the final settlement by allowing each to receive one-half of each fee as collected. Had both parties fully complied with the liquidation agreement each would have received his part of each fee, less proper deductions for expenses. Neither party intended that the other could withhold division of fees collected by him and insist upon one-half of the fees collected by his co-partner. That Seyfarth did not so intend is shown by his position here and in the accounting suit, where he asked that the receiver take possession of all, not half of the fees, and hold same until full accounting and adjournment. Leonard took a similar position there and in this case by insisting that, because of alleged defaults by Seyfarth under the liquidation agreement, he, Leonard, is entitled to have Seyfarth's share of the fees retained by the receiver until final adjournment of the rights of the parties. So far the record discloses no default on the part of Seyfarth. The orders of November 27, 1942 in the accounting suit show the withholding of fees collected by Leonard, and there is neither allegation nor proof of payment by him of the fees directed to be paid to the receiver. The offer to do equity is conditioned on the court supplying the money by granting the relief sought by petitioners. In this state of the record we cannot hold



6.

fees while his, Seyfarth's share is being withheld. Neither can we concede that it would be equitable to permit that disposition of the fees.

Equally untenable is petitioners' position that this court has adjudicated Leonard's right to one-half of these fees while Seyfarth's half is being withheld. In the opinion on the receivership order it was expressly said: "We cannot in this case order disposition of the fees held under court order by any receiver in any other case." That statement expressly excluded any adjudication as to the fees held by the receiver in this case. Furthermore, from the fees to be collected by the receiver in the accounting case this court excepted "those fees now in the hands of other receivers, who, the record shows, will hold such fees until this case (the accounting suit) is terminated."

We do not find in the record any change of circumstances which would justify a modification of the order of August 7, 1940, or any of the subsequent orders based thereon. This is the third appeal in this and the accounting suit from orders relating to the fees now in controversy. The accounting suit was started more than two years ago. It could have been concluded and the rights of the parties adjudicated with a full hearing within a few months. Until the final determination of that suit the money held by the receiver should be retained by him so that if either partner has wrongfully withheld fees the other may have a fund securing him against such wrongs.

The orders appealed from are affirmed.

ORDERS AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.



fees while Mrs. Geylart's share is being withheld. It can be conceded that it would be equitable to permit that disposition of the

fees.

Equally untenable is petitioner's position that this court has adjudicated Leonard's right to one-half of these fees while Geylart's half is being withheld. In the opinion on the receivership order it was expressly said: "We cannot in this case order disposition of the fees held under court order by any receiver in any other case." That statement expressly excluded any adjudication as to the fees held by the receiver in this case. Furthermore, from the fees to be collected by the receiver in the accounting case this court excepted "those fees now in the hands of other receivers, who, the record shows, will hold such fees until this case (the accounting suit) is terminated."

We do not find in the record any change of circumstances which would justify a modification of the order of August 7, 1940, on any of the subsequent orders based thereon. This is the third appeal in this and the accounting suit from orders relating to the fees now in controversy. The accounting suit was started more than two years ago. It could have been concluded and the rights of the parties adjudicated with a full hearing within a few months. Until the final determination of that suit the money held by the receiver should be retained by him so that if either partner has wrongfully withheld fees the other may have a fund securing him against such wrongs.

The orders appealed from are affirmed.

ORDERS AFFIRMED.

O'Connor, P. J., and Matohett, J., concur.

320 I.A. 362<sup>2</sup>

42611

ROBERT MEGAHY,

Appellee,

v.

THELMA MEGAHY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree of divorce finding her guilty of habitual drunkenness and dismissing her counterclaim for separate maintenance.

On defendant's demand the case was tried before a jury, which found against her. This verdict was binding upon the court and can be set aside only in accordance with the practice in cases at common law. Teal v. Teal, 324 Ill. 207. On the question of separate maintenance it was only advisory. Berg v. Berg, 223 Ill. 209.

The parties were married November 18, 1939, and separated March 23, 1942. The plaintiff testified that from about a monthn after the marriage until the separation defendant drank a pint or half a pint of whiskey a day; that he often saw her drink, smelled liquor on her and found empty or half empty bottles daily; that he knew by her actions she had consumed the liquor. He also testified to intoxication on occasions, including drinking for a week before they separated. Mrs. Rich, in whose home the parties lived from July until December, 1941, testified that defendant came in intoxicated and abused and cursed plaintiff, and that witness found bottles in the room under the mattress and in chiffonier drawers. Dr. Kersey, who smoothed the troubled waters after numerous quarrels between the parties, testified that plaintiff wanted defendant to stop drinking and defendant insisted that if plaintiff could spend money on



320 I.A. 383

4891

ROBERT MEGANY,

Appellee,

v.

THELMA MEGANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE NIKSEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree of divorce finding her guilty of habitual drunkenness and dismissing her counterclaim for separate maintenance.

On defendant's demand the case was tried before a jury, which found against her. This verdict was binding upon the court and can be set aside only in accordance with the practice in cases of common law. Teal v. Teal, 324 Ill. 207. On the question of separate

maintenance it was only advisory. Berg v. Berg, 223 Ill. 203.

The parties were married November 18, 1932, and separated March 23, 1942. The plaintiff testified that from about a month after the marriage until the separation date and drank a pint or half a pint of whiskey a day; that he often saw her drunk, smelled liquor on her and found empty or half empty bottles daily; that he knew by her actions she had consumed the liquor. He also testified to intoxication on occasions, including drinking for a week before they separated. Mrs. Rich, in whose home the parties lived from July until December, 1941, testified that defendant came in intoxicated and abused and cursed plaintiff, and that witness found bottles in the room under the mattress and in children's drawers. Dr. Kersey, who attended the troubled waters after numerous quarrels between the parties, testified that plaintiff wanted defendant to stop drinking and defendant insisted that if plaintiff could spend money on



2.

photography she could afford to have liquor in the house; that defendant said she liked to drink at times and saw no harm in it.

Defendant contends that this evidence, standing alone, is insufficient to support a finding of habitual drunkenness, and furthermore, that it was overcome by testimony on behalf of defendant. Habitual drunkenness, under the statute, is defined in Dorian v. Dorian, 298 Ill. 24, and Richards v. Richards, 19 Ill. App. 465, cited by defendant. Plaintiff's evidence meets the definition set out in these cases and shows that during a period of more than two years before the separation defendant was unable or unwilling to refrain from the habitual and excessive use of intoxicants.

In opposition to the testimony on behalf of plaintiff, defendant denied excessive drinking or being intoxicated in the home of Mrs. Rich. She substantially agreed with Dr. Kersey's version of the conversation stated by him and testified that she worked in a currency exchange and as laboratory technician until March 1941, a year before the separation. The owner and an employee of the exchange testified that her work was satisfactory. These witnesses, the lady in whose home the parties lived from December 1941, to March 1942, and a friend at whose home defendant visited, all testified that they had not seen defendant intoxicated. The Richards case, cited by defendant, holds that the use of intoxicants need not disqualify the person charged with habitual drunkenness from attending to business during the particular portion of the day usually devoted to business. This is in accord with the better rule. 17 Am. Jur., Divorce and Separation, sec. 137.

The jury has accepted the testimony on behalf of plaintiff and rejected that on behalf of defendant. Their verdict was binding on the trial court and is binding on this court. It cannot be set aside unless it is manifestly against the weight of the evidence. Stafford v. Stafford, 299 Ill. 438. The chancellor, who saw the witnesses and heard them testify, has approved the verdict of the jury, thereby holding that it was not against the manifest weight of the evidence.

photography she could afford to have liquor in the house; that defendant said she liked to drink at times and saw no harm in it. Defendant contends that this evidence, standing alone, is insufficient to support a finding of habitual drunkenness, and furthermore, that it was overcome by testimony on behalf of defendant. Habitual drunkenness, under the statute, is defined in Dorian v. Dorian, 298 Ill. 24, and Richards v. Richards, 18 Ill. App. 433, cited by defendant. Plaintiff's evidence meets the definition set out in these cases and shows that during a period of more than two years before the separation defendant was unable or unwilling to refrain from the habitual and excessive use of intoxicants. In opposition to the testimony on behalf of plaintiff, defendant denied excessive drinking or being intoxicated in the home of Mrs. Rich. She substantially agreed with Dr. Kersey's version of the conversation stated by him and testified that she worked in a currency exchange and as laboratory technician until March 1941, a year before the separation. The owner and an employee of the exchange testified that her work was satisfactory. These witnesses, the lady in whose home the parties lived from December 1941, to March 1942, and a friend whose home defendant visited, all testified that they had not seen defendant intoxicated. The Richards case, cited by defendant, holds that the use of intoxicants need not disqualify the person charged with habitual drunkenness from attending to business during the particular portion of the day usually devoted to business. This is in accord with the better rule. 17 Am. Jur., Divorce and Separation, sec. 137. The jury has accepted the testimony on behalf of plaintiff and rejected that on behalf of defendant. Their verdict was binding on the trial court and is binding on this court. It cannot be set aside unless it is manifestly against the weight of the evidence. Stallord v. Stallord, 299 Ill. 439. The chancellor, who saw the witnesses and heard them testify, has approved the verdict of the jury, thereby holding that it was not against the manifest weight of the evidence.

3.

With that holding we agree.

Neither party offered any substantial evidence as to any charges except that of the habitual drunkenness of the defendant. Having failed in her defense to that charge, her counterclaim for separate maintenance necessarily falls, as her drunkenness is legal justification for plaintiff's refusal to live with her after the separation in March, 1942.

The trial court did not err in the rulings on evidence brought to our attention. The instruction complained of is not erroneous. It appears an order was entered directing plaintiff to pay \$50 as solicitor's fees and expenses. There is nothing to show that the alleged violation of this order was raised in the trial court or that any other requests for alimony or solicitor's fees were made in that court. The trial court did not err in failing to make further allowances.

The decree of the Superior court is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.



With that holding we agree.

Neither party offered any substantial evidence as to any charges except that of the habitual drunkenness of the defendant. Having failed in her defense to that charge, her counterclaim for separate maintenance necessarily fails, as her drunkenness is legal justification for plaintiff's refusal to live with her after the separation in March, 1942.

The trial court did not err in the rulings on evidence brought to our attention. The instruction complained of is not erroneous. It appears an order was entered directing plaintiff to pay \$50 as solicitor's fees and expenses. There is nothing to show that the alleged violation of this order was raised in the trial court or that any other requests for alimony or solicitor's fees were made in that court. The trial court did not err in failing to make further allowances.

The decree of the supreme court is affirmed.

AFFIRMED.

O'Connor, P. J., and Mahoney, J., concur.

DOMINICO SELVAGGIO,  
Counter Defendant below

v.

VINCENZO MICCI,  
Counter Claimant below,

and ROSA MICCI,  
Intervening Petitioner and  
Counter Claimant below,

JOSEPHINE SELVAGGIO,  
Counter Defendant below.

DOMINICO SELVAGGIO,  
Appellant,

v.

VINCENZO MICCI and ROSA MICCI,  
Appellees.

APPEAL FROM

SUPERIOR COURT,  
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing his complaint asking an accounting as to the proceeds of a note secured by trust deed, and sustaining a counterclaim for foreclosure of the trust deed.

In 1930 plaintiff was building a six room bungalow on a lot in Chicago Heights which he had purchased in 1924; he was a shop worker, unable to read or write English and unfamiliar with business transactions; he needed money to complete the building, and defendant Vincenzo Micci, his friend and co-worker, also unfamiliar with business transactions, agreed to loan him \$3,500, secured by trust deed on the property; they went to a lawyer, who drew the note and trust deed bearing date October 1, 1930; same were duly signed and the trust deed recorded; Micci was named as trustee; plaintiff worked on the building, ordered all material, paid certain laborers and materialmen and sent others to Micci for their money; the building was completed in the early part of 1931.

320 I.A. 363

42824

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

DOMINICO SELVAGGIO,  
Counter Defendant below

V.  
VINCENTO MICCI,  
Counter Claimant below,

and ROSA MICCI,  
Intervening Petitioner, and  
Counter Claimant below,

JOSEPHINE SELVAGGIO,  
Counter Defendant below.

DOMINICO SELVAGGIO,  
Appellant,

V.  
VINCENTO MICCI and ROSA MICCI,  
Appellees.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing his complaint asking an accounting as to the proceeds of a note secured by trust deed, and sustaining a counterclaim for foreclosure of the trust deed. In 1930 plaintiff was building a six room bungalow on a lot in Chicago Heights which he had purchased in 1924; he was a shop worker, unable to read or write English and unfamiliar with business transactions; he needed money to complete the building, and defendant Vincenzo Micci, his friend and co-worker, also unfamiliar with business transactions, agreed to loan him \$3,500, secured by trust deed on the property; they went to a lawyer, who drew the note and trust deed bearing date October 1, 1930; same were duly signed and the trust deed recorded; Micci was named as trustee; plaintiff worked on the building, ordered all material, paid certain laborers and materialmen and sent others to Micci for their money; the building was completed in the early part of 1931.



2.

Plaintiff has paid defendant \$2,631.25 on account of the note. May 1, 1941 he filed his complaint for an accounting, alleging that the amounts actually paid by Micci were considerably less than \$3,500 and that Micci had failed and refused to render an accounting, etc. Micci answered, alleging that he had paid out the full amount and denying that he had failed or refused to account. Later Rosa Micci, his wife, was allowed to intervene. Each of the Miccis filed a counterclaim, alleging themselves to be the joint owners of the \$3,500 note and praying for the foreclosure of the trust deed securing the note. The matter was referred to a special commissioner, who heard the evidence and made a report finding that Micci had paid out for the use of plaintiff in the erection of the building the full sum of \$3,500, and recommending the dismissal of the complaint for want of equity and the foreclosure of the trust deed.

Plaintiff called as a witness the head of the lumber company which furnished material for the building. This witness testified on cross-examination that Micci had paid him \$1,570 on account. A bank book received in evidence shows the withdrawal of that sum by Micci at the time of payment. The total bill was \$1,867.74, and the balance of \$297.74, evidenced by a note signed by plaintiff and Micci, was later paid by plaintiff. Micci testified to the payment of \$1,327 to other materialmen and produced signed waivers of lien from them reciting the amount of money received. In addition he produced receipted bills covering attorneys' fees for the preparation of the trust deed and note and for insurance, aggregating \$119.60. He testified to payments of smaller amounts to other materialmen and workers covering the remaining \$483.40. He produced a statement prepared by him in the Italian language showing the respective amounts and the names of the parties. No claim is made that any of the persons or companies paid had not worked upon the building or furnished material therefor. None of them has made demand upon plaintiff or denied receipt of payment. Micci testified that plaintiff knew of all the

Plaintiff has paid defendant \$2,621.25 on account of the note. May 1, 1941 he filed his complaint for an accounting, alleging that the amounts actually paid by Micolet were considerably less than \$2,600 and that Micolet had failed and refused to render an accounting, etc. Micolet answered, alleging that he had paid out the full amount and denying that he had failed or refused to account. Later Rosa Micolet, his wife, was allowed to intervene. Each of the Micolets filed a counterclaim, alleging themselves to be the joint owners of the \$2,600 note and praying for the foreclosure of the trust deed securing the note. The matter was referred to a special commissioner, who heard the evidence and made a report finding that Micolet had paid out for the use of plaintiff in the erection of the building the full sum of \$2,600, and recommending the dismissal of the complaint for want of equity and the foreclosure of the trust deed.

Plaintiff called as a witness the head of the lumber company which furnished material for the building. This witness testified on cross-examination that Micolet had paid him \$1,570 on account. A bank book received in evidence shows the withdrawal of that sum by Micolet at the time of payment. The total bill was \$1,887.74, and the balance of \$317.74, evidenced by a note signed by plaintiff and Micolet, was later paid by plaintiff. Micolet testified to the payment of \$1,327 to other materialmen and produced signed waivers of lien from them reciting the amount of money received. In addition he produced receipts bills covering attorneys' fees for the preparation of the trust deed and note and for insurance, aggregating 119.60. He testified to payments of smaller amounts to other materialmen and workers covering the remaining \$483.40. He produced a statement prepared by him in the Italian language showing the respective amounts and the names of the parties. No claim is made that any of the persons or companies paid had not worked upon the building or furnished material therefor. None of them has made demand upon plaintiff or denied receipt of payment. Micolet testified that plaintiff knew of all the

3.

payments made by him for labor and material; that plaintiff had never requested an accounting or statement but had regularly made payments on account of the note. The trial court approved the commissioner's report and decreed dismissal of the complaint for want of equity. This part of the decree is supported by the overwhelming weight of the evidence.

The complaint for accounting being dismissed, foreclosure of the trust deed necessarily followed. No complaint is made as to this part of the decree except the argument, unsupported by citation of authorities, that interest should not begin to run until the accounting was made on the hearing - over ten years after the date of the note and trust deed. With this contention we cannot agree. The dismissal of the complaint asking an accounting destroys the factual basis of plaintiff's argument.

There being no error in the proceedings in the trial court, the decree is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.



payments made by him for labor and material; that plaintiff had never requested an accounting or statement but had regularly made payments on account of the note. The trial court approved the commissioner's report and decreed dismissal of the complaint for want of equity. This part of the decree is supported by the overwhelming weight of the evidence.

The complaint for accounting being dismissed, foreclosure of the trust deed necessarily followed. No complaint is made as to this part of the decree except the argument, unsupported by citation of authorities, that interest should not begin to run until the accounting was made on the hearing - over ten years after the date of the note and trust deed. With this contention we cannot agree. The dismissal of the complaint asking an accounting destroys the factual basis of plaintiff's argument.

There being no error in the proceedings in the trial court, the decree is affirmed.

AFFIRMED.

O'Connor, P. J., and Ketchett, J., concur.

320 I.A. 433

JOHN P. FRIEDLUND,

Appellant,

v.

HOWARD F. BISHOP and EUGENE H. DUPEE,  
 individually and as co-partners doing  
 business under the name and style of  
 LYMAN, ADAMS, BISHOP AND DUPEE,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The facts that are called to our attention by the plaintiff are these. In a former action an appeal was taken to this court by the plaintiff and was reversed. Plaintiff, a lawyer, filed suit for forwarding or associate fees based on a written agreement in connection with the condemnation proceedings for the widening of La Salle Street in Chicago. Defendants received a fee of \$10,023.85. The plaintiff claims one-third, or \$3,341.10. The case was tried without a jury. On the first trial the court held that the contract was unenforceable and found for defendants on conclusion of plaintiff's evidence. The Appellate Court reversed and remanded the case. (Friedlund v. Bishop, 310 Ill. App. 537). On the second trial the trial court found for plaintiff and entered judgment for \$95.25.

It appears that the evidence in the plaintiff's case was established by reading into the record, by agreement, the transcript of the evidence from the first trial. The plaintiff copied the statement of facts from the brief filed in the first appeal, to which are added facts adduced by defendants.

John P. Friedlund, an attorney, filed suit against Howard F. Bishop, Eugene H. Dupee and Spencer L. Adams, a law co-partnership, doing business under the name and style of Lyman, Adams, Bishop & Dupee, to collect agreed forwarding fees, arising out of condemnation proceedings against the property situated at La Salle, Eugenie and Clark Streets, Chicago, in the proceedings for the widening of La Salle Street. The property was owned by a lodge. Legal title to



3201.A.438

JOHN P. FRIEDLUND,

Appellant,

v.

HOWARD E. BISHOP and EUGENE H. DUPEE,  
individually and as co-partners doing  
business under the name and style of  
LYMAN, ADAMS, BISHOP AND DUPEE,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE KESSEL DELIVERED THE OPINION OF THE COURT.

The facts that are called to our attention by the plaintiff are these. In a former action an appeal was taken to this court by the plaintiff and was reversed. Plaintiff, a lawyer, filed suit for forwarding or associate fees based on a written agreement in connection with the condemnation proceedings for the widening of La Salle Street in Chicago. Defendants received a fee of \$10,023.82. The plaintiff claims one-third, or \$3,341.10. The case was tried without a jury. On the first trial the court held that the contract was unenforceable and found for defendants on conclusion of plaintiff's evidence. The appellate court reversed and remanded the case. (Friedlund v. Bishop, 310 Ill. App. 537). On the second trial the trial court found for plaintiff and entered judgment for \$2,325. It appears that the evidence in the plaintiff's case was established by reading into the record, by agreement, the transcript of the evidence from the first trial. The plaintiff copied the statement of facts from the brief filed in the first appeal, to which are added facts advanced by defendants.

John P. Friedlund, an attorney, filed suit against Howard E. Bishop, Eugene H. Dupree and Spencer L. Adams, a law co-partnership, doing business under the name and style of Lyman, Adams, Bishop & Dupree, to collect agreed forwarding fees, arising out of condemnation proceedings against the property situated at La Salle, Eugene and Clark Streets, Chicago, in the proceedings for the widening of La Salle Street. The property was owned by a lodge. Legal title to



the property was held by Friedlund. He and his wife executed a declaration of trust, prepared by another attorney for the lodge. Lyman, Adams, Bishop & Dupee represented a large number of property owners on La Salle Street in the condemnation suit. Lyman, Adams, Bishop & Dupee, by Dupee, wrote Friedlund a letter, stating that they would represent the property in the condemnation suit; that their fee would be on a contingent basis, namely, one-third of any increase in the award and decrease in the assessment, and that they would allow Friedlund one-third of their fee as associate counsel. Friedlund answered the letter, accepting the proposed terms.

About two years later, the lodge negotiated a deal for the sale of the property. When the sale was made, the buyer recognized and approved the terms of the employment of the attorneys, and agreed to pay the contingent fee to Lyman, Adams, Bishop & Dupee, but stated that he should not be responsible for the division of fees between the attorneys. The terms of the original agreement between Friedlund and Lyman, Adams, Bishop & Dupee were attached to the new agreement, which was signed by Friedlund, by the buyer, and by Lyman, Adams, Bishop & Dupee. Lyman, Adams, Bishop & Dupee filed their appearance, on behalf of the property, and Messrs. Adams, Bishop & Dupee filed individual notices of attorney's lien.

Thereafter, the property was conveyed to Foreman State Bank, as trustee, who held title for a syndicate managed by Bills Realty. In the interim, conversations and correspondence passed between Friedlund, Bishop, Dupee, and Bills Realty, with reference to condemnation proceedings, and in connection with the extension of a mortgage which the lodge held as part of the purchase price.

It appears from the facts as stated that on December 31, 1929, the partnership of Lyman, Adams, Bishop & Dupee was dissolved. Certain matters between Messrs. Bishop and Dupee were carried on to November 9, 1931, when they dissolved their relationship. Upon the final dissolution,

the property was held by Friedland. He and his wife executed a declaration of trust, prepared by another attorney for the lodge. Lyman, Adams, Bishop & Duce represented a large number of property owners on La Salle Street in the condemnation suit. Lyman, Adams, Bishop & Duce, by Duce, wrote Friedland a letter, stating that they would represent the property in the condemnation suit; that their fee would be on a contingent basis, namely, one-third of any increase in the award and decrease in the assessment, and that they would allow Friedland one-third of their fee as associate counsel. Friedland answered the letter, accepting the proposed terms.

About two years later, the lodge negotiated a deal for the sale of the property. When the sale was made, the buyer recognized and approved the terms of the employment of the attorneys, and agreed to pay the contingent fee to Lyman, Adams, Bishop & Duce, but stated that he should not be responsible for the division of fees between the attorneys. The terms of the original agreement between Friedland and Lyman, Adams, Bishop & Duce were attached to the new agreement, which was signed by Friedland, by the buyer, and by Lyman, Adams, Bishop & Duce. Lyman, Adams, Bishop & Duce filed their appearance on behalf of the property, and Messrs. Adams, Bishop & Duce filed individual notices of attorney's lien.

Thereafter, the property was conveyed to Foreman State Bank, as trustee, who held title for a syndicate managed by Billie Realty. In the interim, conversations and correspondence passed between Friedland, Bishop, Duce, and Billie Realty, with reference to condemnation proceedings, and in connection with the extension of a mortgage which the lodge held as part of the purchase price.

It appears from the facts as stated that on December 31, 1930, the partnership of Lyman, Adams, Bishop & Duce was dissolved. Certain matters between Messrs. Bishop and Duce were carried on to November 9, 1931, when they dissolved their relationship. Upon the final dissolution,



Howard Bishop took over all La Salle street condemnation cases of the firm, including the one in question. His efforts were successful, and he succeeded in increasing the award from \$55,367 to \$86,500, an increase of \$31,133. The assessment was reduced by a public benefit order from \$7,645 to \$4,909.45, a saving of \$2,735.55, and interest of \$8,962.30 was collected. On November 27, 1936, Bishop received a fee of \$7,783.25 for the increase in the award, and \$2,240.58 for the collection of interest, a total fee of \$10,023.83, of which plaintiff claims one-third. Dupee received no part of the fee when collected, but upon the winding up of his affairs with Mr. Bishop, he received \$7,000 from Bishop, for his interest in all condemnation cases then pending in which he and Bishop were interested. Dupee and Adams thereupon released their attorney's lien. Bishop released his attorney's lien when his fee was paid.

The agreement that was entered into by the parties was set forth in the form of a letter headed "Law offices of Lyman, Adams, Bishop & Dupee, Chicago, December 12, 1925," and addressed to John P. Friedlund, reading as follows:

"Confirming our conversation about your property on La Salle Street, my understanding is that you wish us to represent this property in the condemnation case for widening North La Salle Street from Ohio to Eugenie Streets, being City of Chicago v. McClellan, County Court #53227; and also to take care of the assessments against your property in the proceeding for widening and improving North La Salle from Washington Street to Ohio Street, City of Chicago v. Buzzell, County Court #53254.

"The property is lots 1, 2, 3, 4 and 5 in Ostrom's subdivision of Lot 1 in Rahm's Lincoln Park Addition to Chicago, in S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of Sec. 33, T. 40 North, Range 14, East of the 3rd P.M., and is situated at the intersection of La Salle, Clark and Eugenie Streets. The award allowed by the Commissioners for the part taken is \$55,367 and the assessment back against Lot 1 is \$1452 and the assessment against lots 2, 3 and 4 is \$5595 and the assessment against lot 5 is \$598. In addition to this, these properties are assessed for the widening and improvement of La Salle Street from Ohio to Eugenie Streets, for which we shall also appear. Our appearance and pleadings are to be filed in the joint name of your firm and ours.

"We are to endeavor by negotiations and, if necessary, by trial to increase the award and reduce the assessment in both cases as much as possible. We are to make you no charge for expenses of witnesses or others in the special assessment matters, but that you are to bear such expenses with respect to the condemnation. Our fee is to be one-third of any increase we secure in the award or decrease in the assessment, and is to be payable at the time the



"is are to endeavor by negotiations and, if necessary, by trial to increase the award and reduce the assessment in both cases as much as possible. We are to make you no charge for expenses of witnesses or others in the special assessment matters, but that you are to bear such expense with respect to the condemnation. Our fee is to be one-third of any increase we secure in the award or appearance and leaden are to be filed in the joint name of your firm and ours.

"The property is lots 1, 2, 3, 4 and 5 in Section 2 and a division of lot 1 in Range 14 North, Range 14, East of the S. E. 1/4 of Sec. 23, T. 40 North, R. 14 East of the 3rd P.M., and is situated at the intersection of La Salle Street and Eugene Streets. The award allowed by the Commissioners for the part taken is \$5,307 and the assessment back against lot 1 is \$452 and the assessment against lots 2, 3 and 4 is \$588 and the assessment against lot 5 is \$58. In addition to this, these properties are assessed for the widening and improvement of La Salle Street from Ohio to Eugene Streets, for which we shall also appear. Our appearance and leaden are to be filed in the joint name of your firm and ours.

"Confirming our conversation about your property on La Salle Street, my understanding is that you wish us to represent this property in the condemnation case for widening North La Salle Street from Ohio to Eugene Streets, being City of Chicago v. McGowan, County Court #32237; and also to take care of the assessments against your property in the proceeding for widening and improving North La Salle from Washington Street to Ohio Street, City of Chicago v. Russell, County Court #32254.

John P. Friedman, reading as follows:

Adams, Bishop & Duce, Chicago, December 12, 1925," and addressed to set forth in the form of a letter headed "Law Offices of Lyman, Duce and Adams thereupon released their attorney's lien. Bishop released his attorney's lien when his fee was paid.

The agreement that was entered into by the parties was

received a fee of \$7,782.25 for the increase in the award, and interest of \$8,982.30 was collected. On November 27, 1925, Bishop benefit order from \$7,645 to \$4,909.45, a saving of \$2,735.55, and an increase of \$31,132. The assessment was reduced by a public firm, including the one in question. His efforts were successful, and he succeeded in increasing the award from \$5,357 to \$82,500, Howard Bishop took over all La Salle Street condemnation cases of the

City pays the award. We are to allow you one-third of our fee as Associate Counsel. In case the award and assessments are negotiated before February 1, 1926, to your satisfaction by the efforts of anyone other than ourselves, then the fee to us net is to be one-sixth of the savings in awards or assessments. If the matter is not so negotiated within the time named, our fee is to be as above.

"I fixed the time for negotiations by other than ourselves at February 1st and not longer, because it will embarrass my efforts very much, as you can readily see, to have had someone else make an unsuccessful attempt of negotiation.

"We will file the necessary pleadings in your name and ours and send you copies thereof.

"If the foregoing arrangement is satisfactory, please confirm by letter.

"I enclose copy of our usual form of contract so that if you wish, some such form can be entered into and the above arrangement given to you in a separate letter.

Very truly yours,

Eugene H. Dupee,

Lyman, Adams, Bishop & Dupee."

EHD:MER

It appears that Mr. Friedlund held title to the property in trust for a lodge, and after the agreement of December 12th, Mr. Dupee sent Mr. Friedlund another agreement for Friedlund to sign as trustee. The word "trustee" in the agreement was in the handwriting of Dupee.

It is submitted that the judgment of the trial court on the second trial allowing plaintiff \$95.00 out of a \$10,000.00 fee again nullifies the agreement and is not in compliance with the opinion of this court in Friedlund v. Bishop, 310 Ill. App. 537. The Appellate Court, in commenting on the agreement, said, "The amount of Defendants' charges was agreed upon, of which Plaintiff was to receive one-third and Defendants two-thirds". In arriving at its decision, the trial court, in part, used the following language, on November 28, 1941:

"Now, I find that there has been a lot of money spent by these attorneys in carrying out this law suit. I don't know that there is any testimony about who was to pay the expenses and the costs of the law suit; but it seems to me that before any division is made, these costs ought to be paid.



City pays the award. We are to allow you one-third of our fee as Associate Counsel. In case the award and assessments are negotiated before February 1, 1928, to your satisfaction by the efforts of anyone other than ourselves, then the fee to us net is to be one-sixth of the savings in awards or assessments. If the matter is not so negotiated within the time named, our fee is to be as above.

"I fixed the time for negotiations by other than ourselves at February 1st and not longer, because it will embarrass my efforts very much, as you can readily see, to have had someone else make an unsuccessful attempt of negotiation.

"We will file the necessary pleadings in your name and ours and send you copies thereof.

"If the foregoing arrangement is satisfactory, please confirm by letter.

"I enclose copy of our usual form of contract so that if you wish, some such form can be entered into and the above arrangement given to you in a separate letter.

Very truly yours,

Eugene H. Dupes,  
Lyman, Adams, Bishop & Dupes."

END:NER

It appears that Mr. Friedland held title to the property in trust for a lodge, and after the agreement of December 12th, Mr. Dupes sent Mr. Friedland another agreement for Friedland to sign as trustee. The word "trustee" in the agreement was in the handwriting of Dupes.

It is submitted that the judgment of the trial court on the second trial allowing plaintiff \$5.00 out of a \$10,000.00 fee again nullifies the agreement and is not in compliance with the opinion of this court in Friedland v. Bishop, 310 Ill. App. 537. The Appellate Court, in commenting on the agreement, said, "The amount of Defendants' charges was agreed upon, of which Plaintiff was to receive one-third and Defendants two-thirds". In arriving at its decision, the trial court, in part, used the following language,

on November 28, 1941:

"Now, I find that there has been a lot of money spent by these attorneys in carrying out this law suit. I don't know that there is any testimony about who was to pay the expenses and the costs of the law suit; but it seems to me that before any division is made, these costs ought to be paid.



"While I don't know whether the contract covers it or not. I don't know whether it does nor not. Now, I think that out of sheer justice, I don't believe any attorney ought to stand up in court and say, 'I want one-third of the fees. You pay all of the expenses; I am not interested in the expenses,' because it shows an inequitable division, finally, in the distribution of the money."

On December 4, 1941, defendants filed an amendment to their answer, pleading as a defense that costs of suit exceeded the amount sued for.

On March 2, 1942, the court rendered judgment for \$95.25, being one-third of \$7,783.25 less \$2500.00 paid to a real estate man.

It has been suggested by the defendant that in the letter set forth as an exhibit to plaintiff's complaint, which is the basis and foundation of plaintiff's claim, the plaintiff consented that there was to be no charge made to him for expenses of witnesses or others in the special assessment matters, but that the plaintiff would "bear such expenses with respect to the condemnation". It would seem clear from that provision that one of the expenses that is to be met by the plaintiff is the expense of witnesses with respect to the condemnation. The undisputed evidence shows that Ernest H. Lyons was paid by Bishop \$2,500 for services rendered by him in connection with the condemnation, which services covered a long period of time and included appraisal and analysis of the value of the portions of the building taken and the cost of reconstructing the damaged buildings and as a result of his work for some four years his services appear to have been effective, as the award was increased \$31,133.

In computing the amount of his claim plaintiff starts with a total fee supposedly collected by the defendants of \$10,023.83. This sum included a fee for interest in which the defendant contends the plaintiff under no circumstances has a right to participate, and also from that sum a deduction of \$2,500 paid the real estate man by Bishop, thus arriving at a supposed net fee of \$7,523.83. However,

"While I don't know whether the contract covers it or not, I don't know whether it does not. Now, I think that out of sheer justice, I don't believe any attorney ought to stand up in court and say, 'I want one-third of the fees, you pay all of the expenses; I am not interested in the expenses,' because it shows an indisputable division, finally, in the distribution of the money."

On December 4, 1941, defendant filed an amendment to their answer, pleading as a defense that costs of suit exceeded the amount sued for.

On March 2, 1942, the court rendered judgment for \$85.28, being one-third of \$7,782.23 less \$2300.00 paid to a real estate man.

It has been suggested by the defendant that in the letter set forth as an exhibit to plaintiff's complaint, which is the basis

and foundation of plaintiff's claim, the plaintiff contended that there was to be no charge made to him for expenses of witnesses or

others in the special assessment matters, but that the plaintiff would "bear such expenses with respect to the condemnation". It

would seem clear from that provision that one of the expenses that is to be met by the plaintiff is the expense of witnesses with respect to the condemnation. The undisputed evidence shows that Ernest H.

Lyon was paid by Bishop \$2,500 for services rendered by him in connection with the condemnation, which services covered a long period of time and included appraisal and analysis of the value of the

portions of the building taken and the cost of reconstructing the damaged buildings and as a result of his work for some four years his services appear to have been effective, as the award was increased

\$31,132.

In computing the amount of his claim plaintiff starts with a total fee supposedly collected by the defendant of \$10,023.83.

This sum included a fee for interest in which the defendant contends the plaintiff under no circumstances has a right to participate, and

also from that sum a deduction of \$2,500 paid the real estate man of Bishop, thus arriving at a supposed net fee of \$7,523.83. However,



when we come to check up on the figures that are involved in considering the amount that is due from the defendant, we find that the sum of \$2,240.58 was on account of collecting interest on the award, which the trial court held that Friedlund was not entitled to participate in as fees. The fees received for increase in the award were \$7,783.25, of which Friedlund was entitled to one-third or \$2,595.25, and the court held that the \$2,500 paid to the real estate man should be deducted from Friedlund's share of the fee, and entered a judgment for the plaintiff for \$95.25, which we believe was justified by the written agreement that was entered into between the parties, a copy of which letter of agreement is attached to the petition filed by the plaintiff.

So that under the circumstances we are of the opinion that the trial court was fully justified in the conclusion that was reached.

The judgment was predicated upon a finding by the trial court on evidence that was undisputed and on evidence not introduced at the former trial. The findings of a court in a trial without a jury are of substantially the same force and effect as a jury verdict.

On the question of the interest on which the plaintiff claims, it appears that the agreement in this case contemplated only an attempt to increase the award. Nothing was said or contemplated at the time regarding the possibility that payment might be so delayed as to necessitate a separate proceeding for its collection. This interest was collected by mandamus proceeding in 1936. This was a separate law suit which could not arise until after the condemnation judgment of November, 1930, and 9 years after the plaintiff ceased to have an interest in the property. Plaintiff actually had received a large amount of fees from time to time from his lodge and from the owners of the property in connection with the extension of the mortgage. There was no intention to include in the original



when we come to check up on the figures that are involved in considering the amount that is due from the defendant, we find that the sum of \$2,240.58 was on account of collecting interest on the award, which the trial court held that Friedland was not entitled to participate in as fees. The fees received for increases in the award were \$7,783.25, of which Friedland was entitled to one-third or \$2,594.25, and the court held that the \$2,500 paid to the real estate man should be deducted from Friedland's share of the fee, and entered a judgment for the plaintiff for \$2,594.25, which we believe was justified by the written agreement that was entered into between the parties, a copy of which letter of agreement is attached to the petition filed by the plaintiff.

So that under the circumstances we are of the opinion that the trial court was fully justified in the conclusion that was reached.

The judgment was predicated upon a finding by the trial court on evidence that was undisputed and on evidence not introduced at the former trial. The findings of a court in a trial without a jury are of substantially the same force and effect as a jury verdict. On the question of the interest on which the plaintiff

claims, it appears that the agreement in this case contemplated only an attempt to increase the award. Nothing was said or contemplated at the time regarding the possibility that payment might be so

delayed as to necessitate a separate proceeding for its collection. This interest was collected by mandamus proceeding in 1930. This was a separate law suit which could not arise until after the condemnation judgment of November, 1930, and 2 years after the plaintiff ceased to have an interest in the property. Plaintiff actually had received a large amount of fees from time to time from his lodge and from the owners of the property in connection with the extension of the mortgage. There was no intention to include in the original

arrangement any participation by the plaintiff in fees which might be recovered in connection with a suit for interest due on the award. The original contract sued upon was in 1925 and the condemnation judgment was rendered November 28, 1930. The testimony indicates that the separate mandamus suit was filed pursuant to a separate agreement with the then owner, The Trust Company of Chicago, as a result of which the interest was obtained. The mandamus order which finally resulted in the payment of the interest was obtained in 1936.

Upon the question of interest that is before this court, it appears from the case of Blakeslee's Storage Warehouses, Inc. v. The City of Chicago, 369 Ill. 480, that interest is not an incident of the principal. The court said:

"On the other hand, the right to interest apart from contract, such as interest on the judgment, does not emanate from the controversy, or from the judgment or from anything of a judicial nature."

And the court further said:

"Furthermore, it is obvious that at the time the judgment was entered there was no interest due. Hence, the subsequently accruing interest, recoverable by virtue of the statute, could not be a part of the judgment when it was entered. How the interest could afterward modify the judgment by increasing it in amount is not suggested, and no logical interpretation of the law can reach any such result. A judgment stands in amount as it is entered, and the only way in which it may be modified is by a direct proceeding for that purpose. Interest on a judgment is to be distinguished from costs in a proceeding, for which judgment is entered as a part of the principal judgment in the cause. The conclusion is inescapable that interest on a judgment is not a part of it. It is further to be noticed that, under the distinction between the two classes of interest mentioned in Section 3 of the Interest Act, the interest on the judgment cannot be considered a part of the value of the land taken, for which the judgment was entered (Blaine v. City of Chicago, supra). Therefore, if appellant is entitled to interest on the judgment, it is not by virtue of the judgment or the judicial proceeding culminating therein, but arises solely under the provisions of the statute."

It appears too when we come to consider the question as to whether Mr. Dupee is subject to the judgment that was entered it is well to consider that he was a party to the agreement that was



arrangement any participation by the plaintiff in fees which might be recovered in connection with a suit for interest due on the award. The original contract sued upon was in 1928 and the condemnation judgment was rendered November 22, 1930. The testimony indicates that the separate mandamus suit was filed pursuant to a separate agreement with the then owner, The Trust Company of Chicago, as a result of which the interest was obtained. The mandamus order which finally resulted in the payment of the interest was obtained in 1932. Upon the question of interest that is before this court,

it appears from the case of Blakeslee's Grocery Warehouse, Inc. v. The City of Chicago, 369 Ill. 480, that interest is not an incident of the principal. The court said:

"On the other hand, the right to interest apart from contract, such as interest on the judgment, does not emanate from the controversy, or from the judgment or from anything of a judicial nature."

And the court further said:

"Furthermore, it is obvious that at the time the judgment was entered there was no interest due. Hence, the subsequently accruing interest, recoverable by virtue of the statute, could not be a part of the judgment when it was entered. Now the interest could afterward modify the judgment by increasing it in amount in any suggested, and no logical interpretation of the law can reach any such result. A judgment stands in amount as it is entered, and the only way in which it may be modified is by a direct proceeding for that purpose. Interest on a judgment is to be distinguished from costs in a proceeding, for which judgment is entered as a part of the principal judgment in the cause. The conclusion is inescapable that interest on a judgment is not a part of it. It is further to be noticed that, under the distinction between the two classes of interest mentioned in Section 5 of the Interest Act, the interest on the judgment cannot be considered a part of the value of the land taken, for which the judgment was entered (Elaine v. City of Chicago, supra). Therefore, if appellant is entitled to interest on the judgment, it is not by virtue of the judgment or the judicial proceeding eliminating therein, but arises solely under the provisions of the statute."

It appears too when we come to consider the question as to whether Mr. Dupee is subject to the judgment that was entered it is well to consider that he was a party to the agreement that was



entered into between the parties which included Mr. Dupes and the plaintiff, and it does not appear from anything in this record that he was relieved of his liability, and therefore under the circumstances Mr. Dupes is subject to the litigation that was proposed by Mr. Friedlund, plaintiff, and is subject to the judgment that was entered.

For the reasons that we have indicated, we are of the opinion that the judgment which was entered was proper, and it is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

entered into between the parties which included Mr. Duce and the plaintiff, and it does not appear from anything in this record that he was relieved of his liability, and therefore under the circumstances

Mr. Duce is subject to the litigation that was proposed by Mr. Friedland, plaintiff, and is subject to the judgment that was entered,

For the reasons that we have indicated, we are of the

opinion that the judgment which was entered was proper, and it is

affirmed.

JUDGMENT AFFIRMED.

MURKIN, P. J. AND KILEY, J. CONCUR.

FRANK A. PASCHKE,

Appellee,

APPEAL FROM

SUPERIOR COURT

v.

COOK COUNTY.

ANNA PASCHKE,

Appellant.

Honorable Joseph Sabath,  
Judge Presiding.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order of the Superior Court entered on July 1st, 1942. On plaintiff's motion the Superior Court dismissed the plaintiff's complaint and the defendant's counterclaim, and denied defendant's motion and petition for the allowance of costs and attorney's fees. The husband, who was the plaintiff, filed his complaint for divorce on February 13, 1942. The husband's complaint, as well as the wife's counter-complaint, charged cruelty, and set forth that the parties had not cohabited together as husband and wife since November 10, 1941, although living in the same apartment, but occupying separate rooms.

The court's order that was entered on the motion of the attorney for the plaintiff provides:

"The court being fully advised in the premises and having jurisdiction of the parties hereto and the subject matter, and it appearing to the court on the record herein, that the plaintiff and defendant are residing in the same apartment, although not occupying the same bedroom during the pendency of this cause,

"It Is Therefore Ordered by the court on motion of the plaintiff that the complaint herein and the counterclaim of said defendant, be and the same are hereby dismissed.

"It Is Further Ordered by the court that defendant's petition and motion for the allowance of fees and costs, be and the same is hereby denied, to all of the foregoing the defendant objects and excepts,

"ENTER: Joseph Sabath,

"July 1, 1942

Judge."

The record that is before this court consists of the petitions and answers and the orders of the court. The question of the alimony which was asked for by the petition of the defendant wife was referred to Alvin Kayner, special commissioner. It further appears from this record that an order was entered on February 24, 1942 by Judge Lupe continuing defendant's motion for alimony to March 12, 1942. Subsequently it appears that the Commissioner submitted his report which contains his



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APPEAL FROM

SUPERIOR COURT

COOK COUNTY

Herman, Joseph Sabath, Plaintiff, vs. Judge Presiding.

Appellee,

v.

Appellant.

ANNA PASCHKE,

FRANK A. PASCHKE,

MR. JUSTICE HENDEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order of the Superior Court entered on July 1st, 1942. On plaintiff's motion the Superior Court dismissed the plaintiff's complaint and the defendant's counterclaim, and denied defendant's motion and petition for the allowance of costs and attorney's fees. The husband, who was the plaintiff, filed his complaint for divorce on February 18, 1942. The husband's complaint, as well as the wife's counter-complaint, charged cruelty, and set forth that the parties had not cohabited together as husband and wife since November 10, 1941, although living in the same apartment, but occupying separate rooms.

The court's order that was entered on the motion of the

attorney for the plaintiff provides:

"The court being fully advised in the premises and having jurisdiction of the parties hereto and the subject matter, and it appearing to the court on the record herein, that the plaintiff and defendant are residing in the same apartment, although not occupying the same bedroom during the pendency of this case, it is therefore ordered by the court on motion of the plaintiff that the complaint herein and the counterclaim of said defendant, be and the same are hereby dismissed. "It is further ordered by the court that defendant's petition and motion for the allowance of fees and costs, be and the same are hereby denied, to all of the foregoing the defendant objects and excepts.

"ENTER:

Joseph Sabath,

Judge.

July 1, 1942

The record that is before this court consists of the petitions

and answers and the orders of the court. The question of the alimony which was asked for by the petition of the defendant wife was referred to Alvin Kayner, special commissioner. It further appears from this record that an order was entered on February 24, 1942 by Judge Luke continuing defendant's motion for alimony to March 12, 1942. Subsequently it appears that the Commissioner submitted his report which contains the

findings as to alimony and solicitor's fees, objections were heard and the order was entered by the court as set forth in this opinion. However, it does not appear that the record was filed so that we would have the report of the Commissioner as to his findings and the evidence that was heard by him, if any, in reaching the conclusions that were submitted to the court. From the order that was entered it appears that the court finds that the plaintiff and defendant were residing in the same apartment although not occupying the same bedroom.

Apparently there must have been evidence offered and heard which is not in this record, so we will have to assume that there was evidence heard which justified the entry by the court of this order and the direction by the court that the motions for fees and costs be denied.

In the case of Lyons v. Lyons, 272 Ill. 329, the Supreme Court held that: Evidence need not be preserved to sustain a decree dismissing a bill. The rule requiring the evidence to be preserved by a certificate of the evidence or recitals in the decree in order that a decree granting affirmative relief may be sustained, does not apply to a decree which grants no affirmative relief, but merely, in effect, dismisses the bill for want of equity.

After a careful consideration of the record as we have it before us we are obliged to consider the order that was entered by the court justified by the evidence that was offered, and it is therefore sustained.

AFFIRMED.

KILEY, J. CONCURS.

BURKE, P.J. DISSENTING IN PART:

In my opinion the wife is entitled to her attorneys fees and suit money.



findings as to alimony and solicitor's fees, objections were heard and the order was entered by the court as set forth in this opinion. However, it does not appear that the record was filed as that we would have the report of the Commissioner as to his findings and the evidence that was heard by him, if any, in reaching the conclusions that were submitted to the court. From the order that was entered it appears that the court finds that the plaintiff and defendant were residing in the same apartment although not occupying the same bedroom.

Apparently there must have been evidence offered and heard which is not in this record, so we will have to assume that there was evidence heard which justified the entry by the court of this order and the direction by the court that the motions for fees and costs be denied.

In the case of Lyons v. Lyons, 373 Ill. 329, the Supreme Court held that: Evidence need not be preserved to sustain a decree dissolving a bill. The rule regarding the evidence to be preserved by a certificate of the evidence or recitals in the decree in order that a decree granting affirmative relief may be sustained, does not apply to a decree which grants no affirmative relief, but merely, in effect, dismisses the bill for want of equity.

After a careful consideration of the record as we have it before us we are obliged to consider the order that was entered by the court justified by the evidence that was offered, and it is

therefore sustained.

AFFIRMED.

KILLY, J. CONCURS.

BURKE, P.J. DISSENTING IN PART:

In my opinion the wife is entitled to her attorney's fees and suit money.



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JOHNSON OIL BURNER SALES CO., a  
corporation,

Appellant,

v.

HERBERT H. NOTTKE, trading under the  
firm name and style of CENTURY CASKET  
COMPANY,

Appellee.

APPEAL FROM

COUNTY COURT

OF COOK COUNTY.

HONORABLE ALBERT E. ISLEY,  
Trial Judge.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This was an action instituted by the plaintiff to recover a \$600 balance due it under a written contract to furnish and install in the premises of the defendant one S. T. Johnson horizontal rotary fuel oil burner, together with certain specifically described accessory equipment. A trial was had before the court, sitting without a jury, resulting in the entry of a judgment in favor of the plaintiff for the sum of \$287.15 and one-half costs, or somewhat less than fifty per cent of the amount sued for, the defendant having been permitted to claim credit upon the trial for certain charges asserted by way of set-off or recoupment.

The plaintiff is a sales corporation, engaged in the sale and installation of oil burning equipment. It is not engaged in manufacturing. The defendant is the owner of a building in Chicago which houses his casket factory and also contains a number of stores, offices and shops. In the early autumn of 1940, the defendant installed a new boiler in his building and at that time he decided to convert from coal to oil as a heat-generating medium. He called Mr. Paul Huck of the plaintiff company, whom he knew to be engaged in the oil heating business, and Mr. Huck came over that very same day. After examining the boiler and inspecting the premises, Huck agreed to submit a bid. Within a few days thereafter, the negotiations of the parties culminated in the execution of a written contract which is as follows:

JOHNSON OIL BURNER SALES CO., a corporation,

Appellant,

v.

HERBERT H. NOTTKE, trading under the firm name and style of CENTURY CASSET COMPANY,

Appellee.

APPEAL FROM

COUNTY COURT

OF COOK COUNTY.

HONORABLE ALBERT B. ISLEY, Trial Judge.

MR. JUSTICE HERBEL DELIVERED THE OPINION OF THE COURT.

This was an action instituted by the plaintiff to recover

a \$600 balance due it under a written contract to furnish and install in the premises of the defendant one B. T. Johnson horizontal rotary fuel oil burner, together with certain specifically described accessory equipment. A trial was had before the court, sitting without a jury, resulting in the entry of a judgment in favor of the plaintiff for the sum of \$287.15 and one-half costs, or somewhat less than fifty per cent of the amount sued for, the defendant having been permitted to claim credit upon the trial for certain charges asserted by way of set-off or recoupment.

The plaintiff is a sales corporation, engaged in the sale

and installation of oil burning equipment. It is not engaged in manufacturing. The defendant is the owner of a building in Chicago, which houses his cassette factory and also contains a number of stores, offices and shops. In the early autumn of 1940, the defendant installed a new boiler in his building and at that time he decided to convert from coal to oil as a heat-generating medium. He called Mr. Paul Nuck of the plaintiff company, whom he knew to be engaged in the oil heating business, and Mr. Nuck came over that very same day. After examining the boiler and inspecting the premises, Nuck agreed to submit a bid. Within a few days thereafter, the negotiations of the parties culminated in the execution of a written contract which is as follows:



"September 17, 1940.

"Century Gasket Co.  
2600 Cicero Avenue  
Chicago, Illinois

Attn: Mr. Herbert Nottke

Dear Sir:

In accordance with your request, we are pleased to submit herewith our proposal for oil burning equipment to be installed in the Kewanee No. 111 boiler rated at 4835 Master Steam Fitter's rating now installed in the above mentioned building.

We propose to furnish and install one (1) 3 $\frac{1}{2}$  type AV full automatic operation, S. T. Johnson horizontal rotary fuel oil burner for use with No. 5 fuel oil, including the following controls:

- One (1) G. E. Starting Switch
- One (1) Minneapolis Honeywell Program Panel
- One (1) " " Magnetic Oil Valve
- One (1) " " Gas Valve
- One (1) " " Safety Stack Switch
- One (1) Combination Gas-Electric Ignition Assembly
- One (1) Ignition Transformer
- One (1) Genuine S. T. Johnson Viscosity Flow Control Valve
- One (1) McDonald Miller Low Water Cut-Off
- One (1) Minneapolis Honeywell Pressuretrol
- One (1) Minneapolis Honeywell Thermostat
- One (1) Tork Clock
- One (1) Hi-low Fire Assembly including linkage, secondary draft door and steam sylphon.

We propose to furnish and install a properly designed and constructed combustion chamber of first class brick set in high temperature cement. Floor of the combustion chamber to be of the checker board type for the uniform admission of secondary air.

Furnish and install all necessary electrical work. Service to be 220 volt, single phase, 60 cycle alternating current. Furnish and install all necessary pipe work. Suction and return lines to be of 1 $\frac{1}{2}$ " standard pipe.

This contract guarantees the burner and equipment as outlined above against defects in material and workmanship for a period of one (1) year. Also to provide free service for a period of one (1) year.

We propose to furnish and install in the place as designated by the plans, one (1) 1500 gallon standard Fire Underwriter's fuel oil storage tank including fill, vent, suction and return lines. Tank to be provided with a manhole bricked to grade. Tank to be provided with brick and sand fill.

All of the above equipment installed as outlined for the sum of \$909.00.

We enclose descriptive literature explaining the various features of our equipment.

Yours very truly,  
Johnson Oil Burner Sales Co.  
By Paul B. Huck."





"9-24-40

"Johnson Oil Burner Sales Co.  
3900 W. Devon Ave.  
Chicago, Ill.

"Furnish and install as per your letter of September 17th last 1-3 $\frac{1}{2}$  type 30 AV S. T. Johnson fuel Oil Burner including controls as listed for full automatic operation with No. 5 fuel oil, for the sum of \$909.00. Payment for the above equipment to be made in three payments over a period of ninety days (90 days).

Herbert H. Nottke  
Century Casket Co."

Immediately upon the signing of the contract, the plaintiff's supervisor of service and installation, Mr. Paul Jones, took charge, and the work of installing the oil burning equipment in the defendant's boiler proceeded apace. The job was completed about October 1st and, according to the testimony of Jones, it was completed in a first class, substantial and workmanlike manner, with the possible exception of one item; the outter's torch had left an irregular edge on the burner mounting plate. Nottke, the defendant, spoke to Jones about this and Jones agreed that, while it did not in anywise impair the efficiency of the burner nor affect its operation, the uneven edge possibly did detract from the appearance of the plate. Consequently, he said, as soon as they could spare a man for that purpose they would cut and mount an entire new plate having a regular edge.

From the evidence there is a suggestion that according to the plaintiff's witnesses this was Nottke's sole complaint. Both witness Jones and Oliver Hansen, the manager of the service department and the general manager, respectively, of the Johnson Oil Burner Sales Company, testified categorically that they were never apprised of any other of the numerous claims raised by the defendant at the trial until after the institution of this suit; that their first acquaintance with most of the claims was upon the filing of defendant's answer.

It appears also, upon the suggestion of the plaintiff, that a few days later, Nottke called Jones on the telephone and demanded to know when the plate was going to be replaced. Jones



"O-24-40"

"Johnson Oil Burner Sales Co.  
3200 W. Devon Ave.  
Chicago, Ill."

"Turnish and install as per your letter of September 17th last 1-3/4 type 30 AV 8, T. Johnson Two Oil Burner including controls as listed for full automatic operation with No. 2 fuel oil, for the sum of \$909.00. Payment for the above equipment to be made in three payments over a period of ninety days (90 days).  
Herbert H. Nottke  
Century Gasnet Co."

Immediately upon the signing of the contract, the plaintiff's supervisor of service and installation, Mr. Paul Jones, took charge, and the work of installing the oil burning equipment in the defendant's boiler proceeded apace. The job was completed about October 1st and, according to the testimony of Jones, it was completed in a first class, substantial and workmanlike manner, with the possible exception of one item; the outer's torch had left an irregular edge on the burner mounting plate. Nottke, the defendant, spoke to Jones about this and Jones agreed that, while it did not in anywise impair the efficiency of the burner nor affect its operation, the uneven edge possibly did detract from the appearance of the plate. Consequently, he said, as soon as they could spare a man for that purpose they would cut and mount an entire new plate having a regular edge.

From the evidence there is a suggestion that according to the plaintiff's witnesses this was Nottke's sole complaint. Both witness Jones and Oliver Hansen, the manager of the service department and the general manager, respectively, of the Johnson Oil Burner Sales Company, testified categorically that they were never apprised of any other of the numerous claims raised by the defendant at the trial until after the institution of this suit; that their first acquaintance with most of the claims was upon the filing of defendant's answer.

It appears also, upon the suggestion of the plaintiff, that a few days later, Nottke called Jones on the telephone and demanded to know when the plate was going to be replaced. Jones



explained that it was then the very peak of the season for heating equipment; that they were in the midst of a tremendous rush, as a result of which they found themselves short-handed; and that as soon as they could possibly spare a man they would have the plate cut and installed. He further testified that he assured the defendant that the matter would be taken care of very shortly and that in the meantime the irregular edge would not in any manner affect the utility of the burner or the operation of the boiler. To that Nottke replied, "You get your man over here by twelve o'clock today, Saturday, or don't bother to send any men at all". Nottke denied having made such a statement, but he was compelled to admit on cross-examination, that he didn't remember whether he had made it or not. Jones says he did. In response to that, Jones said that he was sorry, but it would be impossible to get a man over there that day; that welders do not work on Saturday; that he would be there to do the job on the following Tuesday morning. Nottke's reply was that he was just getting "the run-around"; that unless they showed up there by twelve o'clock that day, he would get somebody else to do it; that the Johnson firm was not the only oil burner company in town. On the following Tuesday morning Jones arrived at the defendant's office, but he was not accorded a very favorable reception. The defendant flew into a violent rage and jumped up and down in a paroxysm of temper. He was visibly agitated. He told Jones that he had ordered the plaintiff company to fix the plate and they had not fixed it; that nobody from the Johnson Oil Burner Sales Company could ever touch that burner again; that he would not permit anybody from that company to lay a hand on his boiler; that he was through with the Johnson Oil Burner Sales Company; and that nobody from that firm could ever come there again. Jones departed. A few days later, he sent the welder back in a renewed effort to install the plate, but apparently he was not permitted to do so.

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explained that it was then the very peak of the season for heating equipment; that they were in the midst of a tremendous rush, as a result of which they found themselves short-handed; and that as soon as they could possibly spare a man they would have the plate out and installed. He further testified that he assured the defendant that the matter would be taken care of very shortly and that in the meantime the irregular edge would not in any manner affect the utility of the burner or the operation of the boiler. To that Hottel replied, "You get your man over here by twelve o'clock today, Saturday, or don't bother to send any men at all." Hottel denied having made such a statement, but he was compelled to admit on cross-examination that he didn't remember whether he had made it or not. Jones says he did. In response to that, Jones said that he was sorry, but it would be impossible to get a man over there that day; that welders do not work on Saturday; that he would be there to do the job on the following Tuesday morning. Hottel's reply was that he was just getting "the run-around"; that unless they showed up there by twelve o'clock that day, he would get somebody else to do it; that the Johnson firm was not the only oil burner company in town. On the following Tuesday morning Jones arrived at the defendant's office, but he was not accorded a very favorable reception. The defendant flew into a violent rage and jumped up and down in a paroxysm of temper. He was visibly agitated. He told Jones that he had ordered the plaintiff company to fix the plate and they had not fixed it; that nobody from the Johnson Oil Burner Sales Company could ever touch that burner again; that he would not permit anybody from that company to lay a hand on his boiler; that he was through with the Johnson Oil Burner Sales Company; and that nobody from that firm could ever come there again. Jones departed. A few days later, he sent the welder back in a renewed effort to install the plate, but apparently he was not permitted to do so.



Shortly after that, Jones called on Nottke again. Nottke was still excited, but after a few minutes he calmed down somewhat and Jones was enabled to tell him that he wanted to finish the plate; that he was desirous of getting the matter off his mind and Nottke's mind as well. The defendant insisted that he be permitted to have his own workman do the job. To make it agreeable for all parties concerned, Jones told the defendant to get the man whom he had employed to cut out the boiler front or some other welder of his choice to submit a proposal and if the price was satisfactory the company would be glad to pay him to remount the plate. The defendant denies that anything was ever said about a proposal. He says that he was simply told to go ahead and have the plate fixed and the plaintiff would pay for it.

Thereafter the defendant paid \$309.00 on account of the contract price of \$909.00, but failed to pay the \$600.00 balance, with the result that the plaintiff brought suit.

About the end of November, 1940, an explosion occurred in the defendant's boiler. Considerable damage ensued. The burner was jarred from its position and the brick work surrounding the boiler was loosened. The defendant called in the Racine Fuel Company to make the repairs.

There is a suggestion made by the plaintiff that there was no evidence in the record of any causal connection between the explosion and any fault or failure on the part of the plaintiff and no showing that the explosion and the resultant damage were in any manner attributable to any breach of contract or warranty by the plaintiff. The court, however, at the trial, permitted the defendant to set off the cost of the repairs against the amount due the plaintiff. Counter-claims were also allowed for certain additions and improvements, some of which it is suggested by the plaintiff were not even mentioned in the pleadings. An attempt was made to recover for an alleged leak in the storage tank, but when it developed that the witnesses were unable to say that there was such a leak that particular claim was rejected.



Shortly after that, Jones called on Motte again. Motte was still excited, but after a few minutes he calmed down somewhat and Jones was enabled to tell him that he wanted to finish the plate; that he was desirous of getting the matter off his mind and Motte's mind as well. The defendant insisted that he be permitted to have his own workman do the job. To make it agreeable for all parties concerned, Jones told the defendant to get the man whom he had employed to cut out the boiler front or some other welder of his choice to submit a proposal and if the price was satisfactory the company would be glad to pay him to remount the plate. The defendant denies that anything was ever said about a proposal. He says that he was simply told to go ahead and have the plate fixed and the plaintiff would pay for it.

Thereafter the defendant paid \$300.00 on account of the contract price of \$600.00, but failed to pay the \$300.00 balance, with the result that the plaintiff brought suit.

About the end of November, 1940, an explosion occurred in the defendant's boiler. Considerable damage ensued. The burner was jarred from its position and the brick work surrounding the boiler was loosened. The defendant called in the Racine Fuel Company to make the repairs.

There is a suggestion made by the plaintiff that there was no evidence in the record of any causal connection between the explosion and any fault or failure on the part of the plaintiff and no showing that the explosion and the resultant damage were in any manner attributable to any breach of contract or warranty by the plaintiff. The court, however, at the trial, permitted the defendant to set off the cost of the repairs against the amount due the plaintiff. Counter-claims were also allowed for certain additions and improvements, some of which it is suggested by the plaintiff were not even mentioned in the pleadings. An attempt was made to recover for an alleged leak in the storage tank, but when it developed that the witnesses were unable to say that there was such a leak that particular claim was

The defendant suggests in the brief filed by him that the contract entered into between the plaintiff and the defendant for the installation of oil burning equipment provides that the burner and equipment are guaranteed for one year against defects in material and workmanship. It also provides for "free service for a period of one year". It is further suggested that plaintiffs represented themselves to be "heating engineers". The plaintiff's representative who prepared and submitted the contract, Mr. Huck, was an oil burner engineer who had had technical training. The defendant submits that he knew nothing about oil burners and never had any experience with them. Mr. Huck for the plaintiff examined the boiler and the premises to be heated four or five times and then prepared the contract and specifications. The defendant relied upon Mr. Huck to design a specific and proper installation that would be suitable for the purpose, and it is contended by the defendant that the installation was not fully completed, was not engineered properly, was not fit for the purpose and was not installed in a workmanlike manner, and specifies a list of thirteen items showing defects in the installation of the oil burner as performed by the plaintiff.

It further appears from the defendant's brief that the actual out-of-pocket expenses of the defendant for making the corrections and repairs of the items that were suggested as being not engineered properly were \$212.85, as evidenced by Exhibits 1 to 10. That the defendant made these payments was stipulated by counsel on the trial and evidenced by cancelled checks.

Mr. Adams, a witness that was called by the defendant, testified that he determined the charges to be made for the labor and material on such jobs and that the invoices in question reflected the fair and reasonable charges at the time for the material and service rendered. No evidence was introduced by the plaintiff as to the reasonableness of the charges.



The defendant suggests in the brief filed by him that the contract entered into between the plaintiff and the defendant for the installation of oil burning equipment provides that the burner and equipment are guaranteed for one year against defects in material and workmanship. It also provides for "free service for a period of one year". It is further suggested that plaintiff's representative themselves to be "heating engineers". The plaintiff's representative who prepared and submitted the contract, Mr. Huck, was an oil burner engineer who had had technical training. The defendant admits that he knew nothing about oil burners and never had any experience with them. Mr. Huck for the plaintiff examined the boiler and the premises to be heated four or five times and then prepared the contract and specifications. The defendant relied upon Mr. Huck to design a specific and proper installation that would be suitable for the purpose, and it is contended by the defendant that the installation was not fully completed, was not engineered properly, was not fit for the purpose and was not installed in a workmanlike manner, and specifies a list of thirteen items showing defects in the installation of the oil burner as performed by the plaintiff.

It further appears from the defendant's brief that the actual out-of-pocket expenses of the defendant for making the corrections and repairs of the items that were suggested as being not engineered properly were \$212.98, as evidenced by Exhibits 1 to 10. That the defendant made these payments was stipulated by counsel on the trial and evidenced by cancelled checks.

Mr. Adams, a witness that was called by the defendant, testified that he determined the charges to be made for the labor and material on such jobs and that the invoices in question reflected the fair and reasonable charges at the time for the material and service rendered. No evidence was introduced by the plaintiff as to the reasonableness of the charges.



It appears from the evidence of defendant's witness Mr. Adams, that his business was service and maintenance for the Racine Fuel Company and that he had been with that company approximately two and a half years. He stated that he had been in the oil burner field about nine or ten years during which time he had installed and serviced oil burners. He further testified that he had estimated costs and charges on other burners and installations. He further testified that he was employed by the plaintiff for a period of a year and a half or two years some five or six years ago and that he worked on oil burners while employed by the plaintiff.

The defendant further suggests in his brief that the major issue in the proceedings in the trial court, which was not touched upon in the plaintiff's brief, was whether there was an implied warranty of fitness for the purpose and, if there was, in what respects were there breaches of the implied warranty.

It is suggested that the list of defects set forth by defendant discloses numerous and substantial defects in the installation of the oil burner equipment, and establishes that the installation was made in a very unworkmanlike, one might say "slipshod", manner. As installed the equipment was not fit for the purpose because it did not operate properly from the second day after it was put into operation. Defendant then calls to our attention on the question whether there was an implied warranty, the provisions of Sec. 15 (1) of the Uniform Sales Act, Ill. Rev. Stat. 1941, ch. 121½, which states:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

The plaintiffs were heating engineers and their representative in the transaction was an oil burner engineer. The defendant, as we have stated before, never had any experience with oil burners and knew nothing about them. The purpose for which the equipment was to be used was made known to the plaintiff's representative, Mr. Huck, who thoroughly examined the boiler for which the equipment was to be

It appears from the evidence of defendant's witness Mr. Adams, that his business was service and maintenance for the Fuel Company and that he had been with that company approximately two and a half years. He stated that he had been in the oil burner field about nine or ten years during which time he had installed and serviced oil burners. He further testified that he had estimated coats and charges on other burners and installations. He further testified that he was employed by the plaintiff for a period of a year and a half or two years some five or six years ago and that he worked on oil burners while employed by the plaintiff.

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The plaintiffs were heating engineers and their representative in the transaction was an oil burner engineer. The defendant, as we have stated before, never had any experience with oil burners and knew nothing about them. The purpose for which the equipment was to be used was made known to the plaintiff's representative, Mr. Hook, who thoroughly examined the boiler for which the equipment was to be



installed and the premises to be heated, and after so examining them four or five times, he was the one who prepared the contract and the specifications. The defendant relied upon Mr. Huck to design a specific and proper installation that would be suitable for the purpose. The instant situation is obviously one whereby operation of law there is an implied warranty of fitness for the purpose.

In Barnett v. Kennedy, 315 Ill. App. 28, there was a contract to purchase a stoker and controls. The purchaser knew nothing about the working or operation of the stoker and left everything to the judgment of the seller. The seller knew what the stoker was to be used for and the court held there was an implied warranty by operation of law that the stoker would be fit for the particular purpose. Evidence of conversations with the salesman at the time of negotiations was permitted in establishing the existence of the implied warranty of fitness for the purpose, the court saying:

"The court properly admitted oral testimony not for the purpose of varying the terms of the original agreement, but because it tended to establish the existence of an implied warranty of the reasonable fitness of the stoker for the particular purpose for which it was intended to serve."

Also cited is the case of Lathrop-Paulson Company v. Perksen, 229 Ill. App. 400. There a sale was made of a bottling machine to a purchaser who had no experience with or knowledge of the operation of the machine. The machine did not properly wash or do the work for which it was purchased. In entering into the contract the purchaser had left everything to the judgment of the seller. In finding an implied warranty, the court held:

"Under such circumstances this parol testimony is not testimony offered to vary the terms of the written contract, but as tending to establish the existence of an implied warranty of the reasonable fitness of the machine for the particular purpose of washing bottles and under the circumstances was properly admitted."

Plaintiff's reply to the defendant's suggestion as to an implied warranty of fitness for the purpose for which the oil burner



installed and the premises to be heated, and after so examining them four or five times, he was the one who prepared the contract and the specifications. The defendant relied upon Mr. Bush to design a specific and proper installation that would be suitable for the purpose. The instant situation is obviously one whereby operation of law there is an implied warranty of fitness for the purpose.

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329 Ill. App. 400. There a sale was made of a bottling machine to a purchaser who had no experience with or knowledge of the operation of the machine. The machine did not properly wash or do the work for which it was purchased. In entering into the contract the purchaser had left everything to the judgment of the seller. In finding an implied warranty, the court held:

"Under such circumstances this parol testimony is not testimony offered to vary the terms of the written contract, but as tending to establish the existence of an implied warranty of the reasonable fitness of the machine for the particular purpose of washing bottles and under the circumstances was properly admitted."

Plaintiff's reply to the defendant's suggestion as to an implied warranty of fitness for the purpose for which the oil burner

was purchased by the defendant, is that far from being the most important issue it is not in issue at all; that the subject matter of the sale in the instant case was one 3½ type 30 Av S. T. Johnson horizontal rotary fuel oil burner with controls, a known, described and definite article sold under its patent or other trade name, and cites as a case upon this question Fuchs & Lang v. Kittredge & Co., 242 Ill. 88, where the court said:

"Where a manufacturer contracts to supply an article which he manufactures for a particular purpose designed by the buyer and known to the vendor, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied. The rule is limited to cases where an article is ordered for a special purpose, and does not apply to cases where a special thing is ordered though it is intended for a special purpose. Where a known, described and definite article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. In a contract for the sale of an article under its patent or other trade name, there is an undertaking that the article delivered shall be of the kind ordered but not that it shall be fit for any particular purpose."

And then it is further suggested by the plaintiff that the idea of an implied warranty is further excluded by the consideration that even if there is unstricken evidence in the record that the buyer relied on the seller's skill and judgment, a question on which there is grave doubt, there is absolutely no proof in the record that the fact of such reliance was ever communicated to the seller; it is not enough that the buyer shall privately rely upon the seller's judgment; the seller must know that he is doing so. Finally it is suggested that there is no proof of any breach of such alleged implied warranty. The obvious purpose of the oil burning unit was to maintain temperatures of a particular degree and there was no evidence at all that it failed to do so.

The plaintiff has called to our attention the fact that the court has stricken from the record, on motion of the plaintiff, the testimony of the witness Adams offered by the defendant as to a causal



was purchased by the defendant, is that far from being the most important issue it is not in issue at all; that the subject matter of the sale in the instant case was one of type SO Av 2. T. Johnson horizontal rotary fuel oil burner with controls, a known, described and definite article sold under its patent or other trade name, and cited as a case upon this question Lynch & Lamy v. Kitzhaber & Co., 242 Ill. 38, where the court said:

"Where a manufacturer contracts to supply an article which he manufactures for a particular purpose designed by the buyer and known to the vendor, so that the buyer necessarily trusts to the judgment or skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied. The rule is limited to cases where an article is ordered for a special purpose, and does not apply to cases where a special thing is ordered though it is intended for a special purpose. Where a known, described and definite article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. In a contract for the sale of an article under its patent or other trade name, there is an understanding that the article delivered shall be of the kind ordered but not that it shall be fit for any particular purpose."

And then it is further suggested by the plaintiff that the idea of an implied warranty is further excluded by the consideration that even if there is uncontradicted evidence in the record that the buyer relied on the seller's skill and judgment, a question on which there is grave doubt, there is absolutely no proof in the record that the fact of such reliance was ever communicated to the seller; it is not enough that the buyer shall privately rely upon the seller's judgment; the seller must know that he is doing so. Finally it is suggested that there is no proof of any breach of such alleged implied warranty. The obvious purpose of the oil burning unit was to maintain temperatures of a particular degree and there was no evidence at all that it failed to do so.

The plaintiff has relied for our attention the fact that the court has stricken from the record, on motion of the plaintiff, the testimony of the witness Adams offered by the defendant as to a causal



connection between the explosion and any culpable act or omission on the part of the plaintiff, on the theory that his evidence was stricken on the ground that this witness was not qualified to testify as an expert, and the evidence of Adams was criticized upon the ground that he possessed no qualification to testify on the subject of explosions so far as this record reveals. Several pages of defendant's brief are devoted to establishing that Adams was familiar with the installations and had estimated cost of repairs and was fully fitted for the purpose for which he was offered as a witness. However, it appears from the record that his testimony was ruled out by the court and no cross appeal has been prosecuted to review that ruling, so that under the circumstances we have to consider the court's action in excluding the testimony was fully justified.

However, when we come to consider the evidence offered by the defendant, it appears that two days after the installation of this oil burner the front door of the boiler blew open and about a half hour later the door was blown off. Nottke testified that he continued to have trouble with the boiler every day. The burner would go out and the doors would blow open and several weeks after the equipment had been installed Mr. Nottke arrived in the morning to find the front and back doors of the boiler blown off, the windows blown out, and the coal door was blown open. The front door of the boiler was lying on the platform. The burner equipment was moved about 6 inches from the front of the boiler and the brick work of the boiler was loosened up.

It appears too that plaintiff's heating engineer and manager admitted on cross examination that if you put a pyrostat too close to the brickwork, which is subject to intense heat, and too close to the fire, it is possible that the brickwork will reflect more of its percentage of heat than it should and therefore the pyrostat would not be in a position to perform the service as a thermostatic control,

connection between the explosion and any culpable act or omission on the part of the plaintiff, on the theory that his evidence was stricken on the ground that this witness was not qualified to testify as an expert, and the evidence of Adams was criticized upon the ground that he possessed no qualification to testify on the subject of explosions so far as this record reveals. Several pages of defendant's brief are devoted to establishing that Adams was familiar with the installation and had estimated cost of repairs and was fully fitted for the purpose for which he was offered as a witness. However, it appears from the record that his testimony was ruled out by the court and no cross appeal has been presented to review that ruling, so that under the circumstances we have to consider the court's action in excluding the testimony was fully justified.

However, when we come to consider the evidence offered by the defendant, it appears that two days after the installation of this oil burner the front door of the boiler blew open and about a half hour later the door was blown off. Mottek testified that he continued to have trouble with the boiler every day. The burner would go out and the doors would blow open and several weeks after the equipment had been installed Mr. Mottek arrived in the morning find the front and back doors of the boiler blown off, the windows blown out, and the coal door was blown open. The front door of the boiler was lying on the platform. The burner equipment was moved about 6 inches from the front of the boiler and the brick work of the boiler was loosened up.

It appears too that plaintiff's heating engineer and manager admitted on cross examination that if you put a pyrostat too close to the brickwork, which is subject to intense heat, and too close to the fire, it is possible that the brickwork will reflect more of its percentage of heat than it should and therefore the pyrostat would not be in a position to perform the service as a thermostatic control.



and the safety of the boiler depended on this instrument.

There were a number of items that were called to the attention of this court and the trial court considered the questions that were offered and the court reached the conclusion that the actual out-of-pocket expense of the defendant for making corrections and repairs after the explosion that we called attention to in this opinion was \$312.85, as evidenced by exhibits 1 to 10; that the defendant made these payments was stipulated by counsel on the trial and evidenced by canceled checks. So that it is apparent that there was some cause that brought about the unusual conditions that were testified to by witnesses and there is not any evidence in this record that the defendant by his managing or operating this oil burner did anything that brought about the damages that were the subject of this litigation. Under the circumstances we are of the opinion that the court was fully justified in making this allowance and entering the judgment for the plaintiff for the difference between \$600 and the \$312.85, leaving a balance of \$287.15, and one-half costs.

So that upon considering the evidence upon the subject matter of this litigation we are of the opinion that the court was fully justified in entering the judgment for \$287.15 and one-half costs.

JUDGMENT AFFIRMED.

KILEY, J. SPECIALLY CONCURRING:

The court heard the testimony and saw the various witnesses and allowed defendant the set-off of \$312.85 and entered judgment for defendant for \$287.15. There is testimony in the record to support the set-off and to establish the causal connection between the defects in the installation of the boiler and incidental apparatus. The court did not strike the testimony of Adams, defendant's expert witness. The court sustained two motions of plaintiff's counsel to strike Adams' testimony, but a reading of the full record of that



and the safety of the boiler depended on this instrument.

There were a number of items that were called to the attention of this court and the trial court considered the questions that were offered and the court reached the conclusion that the actual out-of-pocket expense of the defendant for making corrections and repairs after the explosion that we called attention to in this opinion was \$312.85, as evidenced by exhibits 1 to 10; that the defendant made these payments as stipulated by counsel on the trial and evidenced by canceled checks. So that it is apparent that there was some cause that brought about the unusual conditions that were testified to by witnesses and there is not any evidence in this record that the defendant by his managing or operating this oil burner did anything that brought about the damages that were the subject of this litigation. Under the circumstances we are of the opinion that the court was fully justified in making this allowance and entering the judgment for the plaintiff for the difference between \$500 and the \$312.85, leaving a balance of \$287.15, and one-half costs. So that upon considering the evidence upon the subject matter of this litigation we are of the opinion that the court was fully justified in entering the judgment for \$287.15 and one-half costs.

JUDGMENT AFFIRMED.

KIRBY, J. SPECIALLY CONCURRING.

The court heard the testimony and saw the various witnesses and allowed defendant the set-off of \$112.85 and entered judgment for defendant for \$287.15. There is testimony in the record to support the set-off and to establish the causal connection between the defects in the installation of the boiler and incidental apparatus. The court did not strike the testimony of Adams, defendant's expert witness. The court sustained two motions of plaintiff's counsel to strike Adams' testimony, but a reading of the full record of that

testimony, plainly reveals that the rulings affected only particular answers made just prior to the motions. At the end of Adams direct testimony the court denied plaintiff's motion to strike the entire testimony. The opinion as to the causal connection was stricken, but on cross-examination Adams' determination of the cause was gone into and there is evidence aside from the opinion from which the cause could be fairly inferred by the court.

BURKE, P.J. DISSENTING:

Plaintiff sued for \$600.00 and was awarded a judgment for \$287.15. The court allowed defendant's claim of recoupment, thereby reducing the amount of plaintiff's judgment. In my opinion the proofs entitle plaintiff to judgment for the full amount of its claim. The record is barren of evidence on which to predicate a recoupment.

testimony, plainly reveals that the rulings affected only particular answers made just prior to the motions. At the end of Adams direct testimony the court denied plaintiff's motion to strike the entire testimony. The opinion as to the causal connection was stricken, but on cross-examination Adams' determination of the cause was gone into and there is evidence aside from the opinion from which the cause could be fairly inferred by the court.

BURKE, P. J. DISSENTING:

Plaintiff sued for \$500.00 and was awarded a judgment for \$287.12. The court allowed defendant's claim of recoupment, thereby reducing the amount of plaintiff's judgment. In my opinion the court entitled plaintiff to judgment for the full amount of its claim. The record is barren of evidence on which to predicate a recoupment.



42046

320 I.A. 135'

WILLIAM JANSEN,

Appellee,

v.

MILK WAGON DRIVERS' UNION,  
LOCAL 753, OF THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, STABLEMEN AND  
HELPERS OF AMERICA, HENRY WEBER,  
J. G. KENNEDY and THOMAS HAGGERTY,  
each individually and as members  
and President, Vice-President and  
Secretary-Treasurer, respectively,  
of the MILK WAGON DRIVERS' UNION,  
LOCAL 753, OF THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
STABLEMEN AND HELPERS OF AMERICA,  
Appellants.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Milk Wagon Drivers' Union, Local 753, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, a voluntary unincorporated association consisting of about 5,000 members, and several individuals who were members and officers of the Union, appeal from a decree of the Superior court awarding the plaintiff, William Jansen, \$1,240 with interest as "sick benefits" by reason of severe injuries sustained by him in the course of his duties as a milk wagon driver, necessitating the immediate amputation of his right leg, which, by concession of the parties, rendered him totally and permanently disabled and incapable of performing his duties; and directing "the defendants, and each of them, \*\*\* jointly and severally \*\*\* to pay unto the plaintiff the sum of Twenty Dollars (\$20.00) per week, commencing one week after the entry of the Decree herein for and during the entire period of his illness and disability." The issues made up by the pleadings were referred to a master in chancery who, after an extended hearing, recommended the relief decreed. Defendants' exceptions to the master's report were overruled and a decree was entered in accordance with the master's recommendations, from which

WILLIAM JANSEN,

Appellee,

v.

MILK WAGON DRIVERS' UNION,  
LOCAL 723, OF THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, STABLEMEN AND  
HELPERS OF AMERICA, BERNY WEBER,  
J. G. KENNEDY and THOMAS MAGGNI,  
each individually and as members  
and President, Vice-President and  
Secretary-Treasurer, respectively,  
of the MILK WAGON DRIVERS' UNION,  
LOCAL 723, OF THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,  
STABLEMEN AND HELPERS OF AMERICA,  
Appellants.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE KELLY DELIVERED THE OPINION OF THE COURT.  
Milk Wagon Drivers' Union, Local 723, of the International  
Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of  
America, a voluntarily unincorporated association consisting of  
about 5,000 members, and several individuals who were members  
and officers of the Union, appeal from a decree of the Superior  
court awarding the plaintiff, William Jansen, \$1,240 with  
interest as "sick benefits" by reason of severe injuries sus-  
tained by him in the course of his duties as a milk wagon  
driver, necessitating the immediate amputation of his right  
leg, which, by concession of the parties, rendered him totally  
and permanently disabled and incapable of performing his duties;  
and directing "the defendants, and each of them, \*\*\* jointly and  
severally \*\*\* to pay unto the plaintiff the sum of Twenty Dollars  
(\$20.00) per week, commencing one week after the entry of the  
Decree herein for and during the entire period of his illness  
and disability." The issues made up by the pleadings were  
referred to a master in chancery who, after an extended hearing,  
recommended the relief decreed. Defendants' exceptions to the  
master's report were overruled and a decree was entered in  
accordance with the master's recommendations, from which



this appeal is taken.

Jansen became a member of the Union February 24, 1925 and was employed as a milk wagon driver from that time until his injury on January 18, 1940. He was a married man, aged 42 at the time of the hearing, living with his wife and three minor children. Beginning in 1925 he paid dues to the Union at the rate of \$12 per quarter, a total of \$48 a year. In July 1927 the dues were raised to \$18 a quarter, or \$72 a year, and continued at that rate. During the 15 years of his employment he worked successively for the Bowman Dairy Company, the Borden-Wieland Company and C. J. Wieland & Son. The Union by-laws pertaining to sick benefits and dues provide that a member of the Union, in continuous employment for a period of ten years prior to the date of the commencement of his illness and in good standing for a period of six months prior thereto, is entitled to benefits in the sum of \$20 weekly for the entire period of his illness.

As the principal ground for reversal it is urged that the finding of the master and the provision of the decree that plaintiff was in good standing for six months prior to the accident (which would have entitled him to the sick benefits awarded in the decree), are contrary to the manifest weight of the evidence. From the Union's records adduced upon the hearing it appears that during the period from February 24, 1925 to January 4, 1940, Jansen paid his dues to the Union in the amounts specified in the by-laws, with the following exceptions: he paid no dues for the last quarter of 1927, none for the third quarter of 1930, made his payments late during the second quarter of 1932, the third and fourth quarters of 1933, the second and third quarters of 1934 and the first quarter of 1935; he paid no dues during the third quarter of 1935 but on



this appeal is taken.

Jansen became a member of the Union February 24, 1927 and was employed as a milk wagon driver from that time until his injury on January 18, 1940. He was a married man, aged 42 at the time of the hearing, living with his wife and three minor children. Beginning in 1927 he paid dues to the Union at the rate of \$12 per quarter, a total of \$48 a year. In July 1937 the dues were raised to \$18 a quarter, or \$72 a year, and continued at that rate. During the 17 years of his employment he worked successively for the Bowman Dairy Company, the Borderland Company and G. J. Wieland & Son. The Union by-laws pertaining to sick benefits and dues provide that a member of the Union, in continuous employment for a period of ten years prior to the date of the commencement of his illness and in good standing for a period of six months prior thereto, is entitled to benefits in the sum of \$20 weekly for the entire period of his illness.

As the principal ground for reversal it is urged that the finding of the master and the provision of the decree that plaintiff was in good standing for six months prior to the accident (which would have entitled him to the sick benefits awarded in the decree), are contrary to the manifest weight of the evidence. From the Union's records adduced upon the hearing it appears that during the period from February 24, 1927 to January 4, 1940, Jansen paid his dues to the Union in the amounts specified in the by-laws, with the following exceptions: he paid no dues for the last quarter of 1927, none for the third quarter of 1930, made his payments late during the second quarter of 1932, the third and fourth quarters of 1933, the second and third quarters of 1934 and the first quarter of 1935; he paid no dues during the third quarter of 1935 but on

November 1 of that year paid \$18, paid no dues during January, February and March 1936 but on May 1 of that year paid \$18, paid no dues during July, August and September 1936 but on October 30 of that year paid \$18, paid no dues during January, February and March 1937 and was late in the payment of his last quarterly dues for 1939. Whenever his payments were made later than provided by the by-laws the Union accepted the payments. Upon the record presented he was four \$18 payments in arrears at the end of 1937. However, during 1938, instead of making four quarterly payments of \$18 each, he made seven such payments, which were all accepted by the Union and credited to his arrearages. Thus, by the end of 1938 he was but \$18 in arrears.

The gravamen of the contention advanced by defendants is that this rendered him a member not in good standing for six months prior to the accident on January 18, 1940. It appears, however, that on January 4, 1940 he paid the Union \$18, and if this amount had been credited on his one quarterly arrearage at the end of 1938, his dues would have been fully paid. The Union accepted the \$18 payment on January 4 but credited it on the current first quarter dues for 1940, which did not become payable under the by-laws until January 31 of that year.

It is urged by defendants that subsequent to 1936 Jansen had been told by the Union stewards "in case he got sick, he would be out the benefits;" that he had ample warning through a legend appearing on his receipts for dues that "under the law in effect January 1, 1936, any member becoming delinquent is required to be in good standing six months instead of three months before he can draw benefits;" that he had been apprised of his delinquency to the extent of \$18 and promised "to take care of it," but failed to do so; and that he admitted the default in the course of his cross-examination by defendants'



default in the course of his cross-examination by defendants' care of it," but failed to do so; and that he admitted the of his delinquency to the extent of \$18 and promised "to take months before he can draw benefits;" that he had been apprised required to be in good standing six months instead of three in effect January 1, 1936, any member becoming delinquent is a legend appearing on his receipts for dues that "under the law would be out the benefits;" that he had ample warning through had been told by the Union stewards "in case he got sick, he It is urged by defendants that subsequent to 1936 Jensen payable under the by-laws until January 31 of that year, the current first quarter dues for 1940, which did not become Union accepted the \$18 payment on January 4 but credited it on at the end of 1938, his dues would have been fully paid. The this amount had been credited on his one quarterly arrears however, that on January 4, 1940 he paid the Union \$18, and it months prior to the accident on January 18, 1940. It appears that this rendered him a member not in good standing for six The gravamen of the contention advanced by defendants is arrears. Thus, by the end of 1938 he was out \$18 in arrears, which were all accepted by the Union and credited to his quarterly payments of \$18 each, he made seven such payments, the end of 1937. However, during 1938, instead of making four the record presented he was four \$18 payments in arrears at provided by the by-laws the Union accepted the payments. Upon dues for 1939. Whenever his payments were made later than and March 1937 and was late in the payment of his last quarterly 30 of that year paid \$18, paid no dues during January, February no dues during July, August and September 1936 but on October February and March 1936 but on May 1 of that year paid \$18, paid November 1 of that year paid \$18, paid no dues during January,



counsel. The master, taking these circumstances into account, found that all of Jansen's dues were not paid on time as required by the by-laws, that he was frequently late in the payment of dues and had on several occasions entirely omitted payment during the current quarters in which the dues became payable, but that plaintiff paid and the Union accepted all dues from plaintiff, the total of which, when accumulated, constituted payment in full from January of 1934 up to December 31, 1939, and therefore he was in good standing on January 18, 1940. We think this conclusion is amply supported by the evidence. An examination of the dues records of the Union reveals that from January 1, 1934 up to but not including the January quarter of 1940, 24 quarterly dues payments accrued and 24 payments were made by the plaintiff. The dues for the January quarter for 1940 were not due until the 31st of January, as provided by subsection G of section 41 of the by-laws of the Union, and it was evidently plaintiff's intention to have the payment made on January 4, 1940, which was 14 days before the accident occurred, apply on the quarter on which he was still in arrears. Thomas Haggerty, secretary and treasurer of the union, who was empowered to accept and apply the dues of members in accordance with the practice and custom of the Union, testified by deposition that for the period from January 1934 to January 1940 plaintiff had not paid "a single quarterly payment \*\*\* on time." This constant irregularity in the payment of plaintiff's dues indicates that the Union, according to its practice, had applied the dues first to the retirement of arrearages and the balance, if any, to the current quarter. Jansen had never paid more than \$18 on any single occasion, except once to cover arrears, and therefore there existed no overplus to apply to current dues which therefore remained delinquent. Furthermore, the \$18 paid on January 4, before the accident, must have been intended to cover his arrears because he had never paid any

counsel. The master, taking these circumstances into account, found that all of Jansen's dues were not paid on time as required by the by-laws, that he was frequently late in the payment of dues and had on several occasions entirely omitted payment during the current quarters in which the dues became payable, but that plaintiff paid and the Union accepted all dues from plaintiff, the total of which, when accumulated, constituted payment in full from January of 1934 up to December 31, 1939, and therefore he was in good standing on January 18, 1940. We think this conclusion is amply supported by the evidence. An examination of the dues records of the Union reveals that from January 1, 1934 up to but not including the January quarter of 1940, 24 quarterly dues payments accrued and 24 payments were made by the plaintiff. The dues for the January quarter for 1940 were not due until the 31st of January, as provided by subsection 4 of section 41 of the by-laws of the Union, and it was evidently plaintiff's intention to have the payment made on January 4, 1940, which was 14 days before the accident occurred, apply on the quarter on which he was still in arrears. Thomas Haggerty, secretary and treasurer of the union, who was empowered to accept and apply the dues of members in accordance with the practice and custom of the Union, testified by deposition that for the period from January 1934 to January 1940 plaintiff had not paid "a single quarterly payment \*\*\* on time." This constant irregularity in the payment of plaintiff's dues indicates that the Union, according to its practice, had applied the dues first to the retirement of arrears and the balance, if any, to the current quarter. Jansen had never paid more than \$18 on any single occasion, except once to cover arrears, and therefore there existed no overplus to apply to current dues which therefore remained delinquent. Furthermore, the \$18 paid on January 4, before the accident, must have been intended to cover his arrears because he had never paid any



dues in advance, and the amount due for the first quarter of 1940 was not payable under the by-laws until January 31. It would be highly inequitable to permit defendants to defeat plaintiff's claim through improper bookkeeping entries. Under the circumstances the master was justified in recommending, and the court in finding, that Jansen was a member in good standing for six months prior to the accident.

Moreover, the Union never exercised any right that it might have had to forfeit the benefits to which Jansen was entitled under the by-laws, and therefore, under the established rule laid down by numerous authorities in this state, waived it. This is indicated by several circumstances, including the regular acceptance of dues for approximately 12 quarters after the alleged default of January 1937, notification to plaintiff of all general and membership meetings after the default of January 1937 and up to January 1940, plaintiff's attendance at, and his exercise of the privilege of voting at, all the general and membership meetings after the alleged default of January 1937 and up to January 1940, and the failure of the Union to terminate his membership by suspension or expulsion. The law is clear that a trade union or benefit society may waive its right to assert the forfeiture of the benefit rights of its members. Metropolitan Accident Association v. Windover, 137 Ill. 417; Conductors Benefit Association v. Tucker, 157 Ill. 194; Olszewski v. Fitchie, 287 Ill. App. 452. And the manner in which an act of waiver is effectuated may be by express agreement or by such conduct of the society as amounts to a recognition of the individual as a member thereof. In Conductors Benefit Association, supra, the court said that "The receipt of assessments after default in payment is a common form of waiver." In subsequent decisions the courts have repeatedly affirmed this doctrine. Dromgold v. Royal Neighbors, etc., 261 Ill. 60; Dugan v. International Association,



Neighbors, etc., 261 Ill. 60; Dugan v. International Association, courts have repeatedly affirmed this doctrine. Thomson v. Royal the court said that "The receipt of assessments after default in as a member thereof. In Conductors Benefit Association, supra, duty of the society as amounts to a recognition of the individual waiver is effectuated may be by express agreement or by such conduct. 287 Ill. App. 452. And the manner in which an act of

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Accident Association v. Windover, 137 Ill. 417; Conductors

the forfeiture of the benefit rights of its members. Metropolitan a trade union or benefit society may waive its right to assert

his membership by suspension or expulsion. The law is clear that and up to January 1940, and the failure of the Union to terminate membership meetings after the alleged default of January 1937

exercise of the privilege of voting at, all the general and

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This is indicated by several circumstances, including the regular rule laid down by numerous authorities in this state, waived it. entitled under the by-laws, and therefore, under the established

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etc., 202 Ill. App. 308; Taugner v. Kidd, 291 Ill. App. 13; Bayci v. Rango, 304 Ill. App. 203; Harris v. Woodmen of the World, 374 Ill. 47.

Defendants' counsel argue that these authorities are not applicable to the case at bar because the authorities apply only to late or delinquent payments but not to actual nonpayment of dues, and also because in this case plaintiff had knowledge that he was in bad standing and had been sufficiently warned. If the master and the court were correct in their conclusions that the \$18 payment of January 4, 1940 was applied, and should have been credited, to the one delinquency existing at the end of 1939, the argument advanced would not differentiate the circumstances from the facts upon which the many decisions cited by plaintiff were decided. The doctrine of waiver rests upon the recognition of a member's good standing by the continued acceptance of his dues and assessments after default has occurred, and it would obviously be a denial of justice to permit a union or society to receive the benefits of a contractual relationship in the form of dues and assessments and still be relieved of its liabilities thereunder. Neither a trade union nor a fraternal benefit society is justified in regarding an individual as a member for the purpose of payment of dues while at the same time denying him the privilege of receiving sick and death benefits. Nor would the fact that Jansen had notice of his default and warning thereof, alter the circumstances. The union had the right under its by-laws to declare a forfeiture, but it was also at liberty to waive the forfeiture if it saw fit, and knowledge on the part of the member that he was in arrears would, in our opinion, not alter the requirement that the union, in order to assert a forfeiture, "must abide inflexibly by the terms of its contract." Metropolitan Accident Association v. Windover, supra.

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 Defendants' counsel argue that these authorities are not

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etc., 202 Ill. App. 308; Tannen v. Kild, 291 Ill. App. 13;



section 0 of section 42 of its by-laws, Jansen was obliged to pay dues for one quarter after suffering disability, and defendants argue that since he never made this payment after the accident he is absolutely precluded from receiving the benefits to which he claims to be entitled. It appears from the record that the Union unequivocally declared on February 1, 1940 that it would refuse to pay plaintiff any sick benefits and thereafter did fail to make any payments in accordance with its by-laws. Under the circumstances it would have been useless for Jansen to make the April quarterly payment of 1940 and he was not required to perform a futile act and go through the idle form of tendering performance when the Union had indicated that it would not fulfill its promise. Scott v. Beach, 172 Ill. 273; Lurie v. Rock Fall Manufacturing Company, 237 Ill. App. 334; Williston on Contracts, Revised Ed., Vol. 5, Sec. 1296, at p. 3691. Defendants also complain of that provision of the decree which directed them to pay Jansen "Twenty Dollars (\$20.00) per week, commencing one week after the entry of the Decree herein for and during the entire period of his illness and disability," and they say that this amounts to a provision that he is to receive sick benefits for the rest of his life. We perceive no reason why plaintiff should be compelled to file weekly successive actions at law. Such relief would be utterly inadequate and he was justified in filing a complaint in chancery to avoid a multiplicity of suits. The decree does not award him sick benefits "for the rest of his life," but merely directs defendants to pay him the sum of \$20 per week for the entire period of his illness and disability, and reserves jurisdiction to preserve the future rights of the Union.

We find no convincing reason why the decree of the Superior court should not be affirmed, and it is so ordered.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

section 6 of section 42 of its by-laws, Jansen was obliged to pay dues for one quarter after suffering disability, and defendants argue that since he never made this payment after the accident he is absolutely precluded from receiving the benefits to which he claims to be entitled. It appears from the record that the Union unequivocally declined on February 1, 1940 that it would refuse to pay plaintiff any sick benefits and thereafter did fail to make any payments in accordance with its by-laws. Under the circumstances it would have been useless for Jansen to make the April quarterly payment of 1940 and he was not required to perform a futile act and go through the idle form of tendering performance when the Union had indicated that it would not fulfill its promise. Scott v. Beach, 172 Ill. 273; Wingo v. Rock Fall Manufacturing Company, 237 Ill. App. 334; Williston on Contracts, Revised Ed., Vol. 5, Sec. 1296, at p. 3691. Defendants also complain of that provision of the decree which directed them to pay Jansen "Twenty Dollars (\$20.00) per week, commencing one week after the entry of the Decree herein for and during the entire period of his illness and disability," and they say that this amounts to a provision that he is to receive sick benefits for the rest of his life. We perceive no reason why plaintiff should be compelled to file weekly successive motions at law. Such relief would be utterly inadequate and he was justified in filing a complaint in chancery to avoid a multiplicity of suits. The decree does not award him sick benefits "for the rest of his life," but merely directs defendants to pay him the sum of \$20 per week for the entire period of his illness and disability, and reserves jurisdiction to preserve the future rights of the Union.

We find no convincing reason why the decree of the Superior Court should not be affirmed, and it is so ordered.

DECREED AFFIRMED.



42549

320 I.A. 435<sup>2</sup>

DONALD KOUBA, a minor,  
by ROBERT KOUBA, next  
friend,

Appellee,

v.

CITY OF CHICAGO, a Municipal  
Corporation, and IRWIN FINK,  
Appellants.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

While running along the east sidewalk of Kedzie avenue where it intersects an alley immediately south of Cermak road in the City of Chicago, Donald Kouba, age nine, ran into or was struck by a city garbage truck emerging from an alley toward Kedzie avenue, and was severely injured. His suit for damages, brought by Robert Kouba, next friend, resulted in a verdict and judgment for \$22,500, from which the city has taken an appeal. Its principal contention is that the occurrence was an accident for which the city is not liable, because it resulted from the carelessness of the plaintiff in running into the side of the truck, which was being driven with reasonable precaution at the time and place of the accident, consistent with the safety of pedestrians and other vehicular traffic, and therefore the court should have either granted defendants' motion for a directed verdict or entered judgment notwithstanding the verdict, and in any event should have granted a new trial on the ground that the jury's finding was against the manifest weight of the evidence.

The accident occurred about noon of August 29, 1941. Donald, with a girl named Connie Miller, had gone to the Kedzie Avenue Department Store near Kedzie avenue and Cermak road. In leaving the store he ran south along the east side of Kedzie avenue toward an alley some 15 or 20 feet away. Upon reaching the alley he either ran into or was struck by the city's truck,



DONALD KOBBA, a minor,  
by ROBERT KOBBA, next  
friend,

Appellee,

CITY OF CHICAGO, a municipal  
corporation, and IRVIN FINK,  
Appellants,

vs. PRESIDING JUDGE FRANK DELIVAND FOR PRISON OF THE COURT.

While running along the east sidewalk of Kedzie avenue where it intersects an alley immediately south of Clark road in the City of Chicago, Donald Kobba, age nine, ran into or was struck by a city garbage truck emerging from an alley toward Kedzie avenue, and was severely injured. His suit for damages brought by Robert Kobba, next friend, resulted in a verdict and judgment for \$25,700, from which the city has taken an appeal. Its principal contention is that the occurrence was an accident for which the city is not liable, because it resulted from the carelessness of the plaintiff in running into the side of the truck, which was being driven with reasonable precaution at the time and place of the accident, consistent with the safety of pedestrians and other vehicular traffic, and therefore the court should have either granted defendants' motion for a directed verdict or entered judgment notwithstanding the verdict, and in any event should have granted a new trial on the ground that the jury's finding was against the manifest weight of the evidence. The accident occurred about noon of August 29, 1941. Donald, with a girl named Connie Miller, had gone to the Kedzie Avenue Department Store near Kedzie avenue and Clark road. In leaving the store he ran south along the east side of Kedzie avenue toward an alley some 15 or 20 feet away. Upon reaching the alley he either ran into or was struck by the city's truck,

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

which was moving west in the alley toward Kedzie avenue.

Donald testified on direct examination that as he took a step off the curb "a big truck came out of the alley and hit me. I could not see down the alley because of the building there. I saw the truck coming after I stepped into the alley, but it was too close up, I couldn't get out of the way. I tried to step back, but the bumper knocked me down before I could step back. I just took that one step off the curb. I was walking fast to catch up with Connie because I thought she would go ahead. Just before I stepped off the sidewalk to cross the alley I did not hear an automobile horn blowing. \*\*\* After I took the step and saw the truck it was halfway out of the alley. It was moving. The bumper struck me first and knocked me." On cross-examination he testified that "When I got to the alley I didn't stop to look to see if anything was coming. I just kept on going." Later, on redirect examination, he stated that he had looked down the alley as he stepped. "I could not see down the alley while on the sidewalk. When I stepped down the truck was on my left. In trying to get out of the way I made a backward movement." On recross-examination he testified that "The truck was halfway between the building and the curb." In response to the question, "How far to the left was the truck?", he first answered "I don't know," and then said that "The truck was right in front of me."

Another witness, Helen Herrick, testified in substance that she was south of the alley, "a little ways past the store front of a big building on the east side of Kedzie avenue. The weather was clear and the streets dry. \*\*\* When I first saw this boy [Donald] he was on the sidewalk about fifteen to twenty feet north of the alley. \*\*\* The alley was between the boy and me. The sidewalk is about two inches above the level of the alley on both sides. \*\*\* I saw the truck as it

which was moving west in the alley toward Kearsley Avenue.

Donald testified on direct examination that as he took a step off the curb "a big truck came out of the alley and hit me. I could not see down the alley because of the building there. I saw the truck coming after I stepped into the alley, but it was too close up, I couldn't get out of the way. I tried to step back, but the bumper knocked me down before I could step back. I just took that one step off the curb. I was walking fast to catch up with Connie because I thought she would go ahead. Just before I stepped off the sidewalk to cross the alley I did not hear an automobile horn blowing. \*\*\* After I took the step and saw the truck it was halfway out of the alley. It was moving. The bumper struck me first and knocked me." On cross-examination he testified that "when I got to the alley I didn't stop to look to see if anything was coming. I just kept on going." Later, on redirect examination, he stated that he had looked down the alley as he stepped. "I could not see down the alley while on the sidewalk. When I stepped down the truck was on my left. In trying to get out of the way I made a backward movement." On cross-examination he testified that "The truck was halfway between the building and the curb." In response to the question, "How far to the left was the truck," he first answered "I don't know," and then said that "The truck was right in front of me."

Another witness, Helen Horvick, testified in substance that she was south of the alley, "a little ways past the store front of a big building on the east side of Kearsley Avenue. The weather was clear and the streets dry. \*\*\* When I first saw this boy [Donald] he was on the sidewalk about fifteen to twenty feet north of the alley. \*\*\* The alley was between the boy and me. The sidewalk is about two inches above the level of the alley on both sides. \*\*\* I saw the truck as it



was approaching the place where the accident happened. \*\*\* When I first saw the truck it was in the alley, it was moving. It kept right on rolling out of the alley. The truck did not come to a full stop before coming out of the alley. \*\*\* When I saw the truck moving and the boy running I just hollered out, look out, look out. All of a sudden they came in contact together. \*\*\* From the time I first saw the truck before emerging from the alley until this event took place it did not come to a stop. When I hollered, back up, the truck backed up \*\*\*. I could see the boy but not plainly in what position he was in, he was on the ground in the alley." On cross-examination Mrs. Herrick testified: "I would not know how far the truck had progressed beyond the edge of this building when I first saw it. \*\*\* It was coming out going slow. The next time I saw the boy he started to run toward the alley. The truck was coming out at the same time. I would not say the boy was running very fast. He was just running. \*\*\* When the truck and the boy came in contact with each other the front of the truck was about half way between the curb and the building. The sidewalk there is about ten feet wide. I hollered 'look out, look out' and lifted my hand. That was all over with already, the truck had gone past the boy, I couldn't see the boy any more." When asked how long after she hollered the truck came to a stop, she answered, "It just stopped right there. I don't think he had any idea he rolled anything over." Counsel then asked the witness whether she had any idea as to whether the boy was struck by the truck or slipped under the truck, and she replied: "Well, I think he was struck by the truck. I would not know for sure. I would not say I am positive to the fact, because I was on the other side of the truck." She further testified that she did not know whether it was the front bumper that struck Donald, because "it seemed like they came in contact together."

Jim Kluppel, the only other occurrence witness on behalf

was approaching the place where the accident happened. When

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kept right on rolling out of the alley. The truck did not come

to a full stop before coming out of the alley. When I saw

the truck moving and the boy running I just hollered out, look

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the alley until this event took place it did not come to a stop.

When I hollered, back up, the truck backed up. I could see

the boy but not plainly in what position he was in, he was on the

ground in the alley. On cross-examination Mrs. Harlick testi-

fied: "I would not know how far the truck had progressed beyond

the edge of this building when I first saw it. It was coming

out going slow. The next time I saw the boy he started to run

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the truck came to a stop, she answered, "It just stopped right

there. I don't think he had any idea he rolled anything over."

Counsel then asked the witness whether she had any idea as to

whether the boy was struck by the truck or slipped under the

truck, and she replied: "Well, I think he was struck by the

truck. I would not know for sure. I would not say I am positive

to the fact, because I was on the other side of the truck." She

further testified that she did not know whether it was the front

end of the truck that struck the boy, because "it seemed like they came in

contact together."

The court then asked the witness whether she had

any other information concerning the accident.

She answered: "No, I don't."

The court then asked the witness whether she had



of plaintiff, testified that on the morning of the accident he was repairing a house at 2215 South Cermak road and was standing in the alley about 130 feet west of Kedzie avenue. "I saw the garbage truck going west. \*\*\* When I first saw the truck it was about half way down the alley, the next time it was across the sidewalk, it was moving at that time. I saw a boy running a slow run. At the same time I saw him hit the truck. The right front wheel came in contact with the boy. When the truck came in contact with the boy it stopped." When asked to describe the accident, he replied: "I see the boy running. He hit the truck. The truck is stopped, it is coming, some guy and pick up the boy, and take away. The truck standing at the same place, coming the coppers. When they pick up the boy he was on the ground between the alley and sidewalk. The space between the truck wheel and the sidewalk was 2-1/2 or 3 feet. I was too far away to see whether any part of the truck ran over the boy. \*\*\* I am able to judge the speed of the trucks when I see them moving. At the time the truck and the boy came together the truck was moving between three and five miles per hour, that is all it was going, slow."

As against this evidence defendants produced the driver of the truck and four of his helpers. Irwin Fink testified that he had been a licensed chauffeur since 1927 and had been driving trucks since that date. On the morning of the accident he was employed by the City of Chicago and was driving a conveyor truck which he described as being in good condition, with four wheel air brakes that were in good working order. Toward noon he was proceeding west in the alley just south of Cermak road. He had a crew of four laborers and the section foreman. After collecting garbage in the alley, which was thrown in the conveyor in the back of the truck, he proceeded west in the alley toward Kedzie avenue. Nobody else was riding in the truck at the time.



of plaintiff, testified that on the morning of the accident he was repairing a house at 2215 South Central road and was standing in the alley about 150 feet west of Kelsie avenue. "I saw the garbage truck going west. \*\*\* When I first saw the truck it was about half way down the alley, the next time it was across the sidewalk, it was moving at that time. I saw a boy running a slow run. At the same time I saw him hit the truck. The right front wheel came in contact with the boy. When the truck came in contact with the boy it stopped." When asked to describe the accident, he replied: "I see the boy running. He hit the truck. The truck is stopped, it is coming, some guy and pick up the boy, and take away. The truck standing at the same place, coming the coppers. When they pick up the boy he was on the ground between the alley and sidewalk. The space between the truck wheel and the sidewalk was 2-1/2 or 3 feet. I was too far away to see whether any part of the truck ran over the boy. \*\*\* I am able to judge the speed of the trucks when I see them moving. At the time the truck and the boy came together the truck was moving between three and five miles per hour, that is all it was going, slow."

As against this evidence defendants produced the driver of the truck and four of his helpers. Irwin Link testified that he had been a licensed chauffeur since 1917 and had been driving trucks since that date. On the morning of the accident he was employed by the City of Chicago and was driving a conveyor truck which he described as being in good condition, with four wheel air brakes that were in good working order. Toward noon he was proceeding west in the alley just south of Central road. He had a crew of four laborers and the section foreman. After collecting garbage in the alley, which was thrown in the conveyor in the back of the truck, he proceeded west in the alley toward Kelsie avenue. Nobody else was riding in the truck at the time.

"As I proceeded west in that alley and just before I arrived at the sidewalk on Kedzie avenue, I was driving three or four miles per hour in first speed. Just as I was approaching the sidewalk on the east side of Kedzie avenue I blew the horn and stopped as I was getting to the edge of the alley just before I hit the sidewalk. I blew the horn about fifteen feet in the alley away from the sidewalk. I tapped it several times. I always do. On that particular morning, that is just exactly what I had been doing. When I got to the sidewalk at the end of the alley, I came to a stop, blew my horn and put the truck in first gear. After I looked both ways I proceeded out of the alley. I looked north and south. I looked left and then right. I could see to the north a couple of feet away from the building and beyond that it would be a curve of about fifteen degree angle. Before I started up my truck I did not see anybody coming towards me. I started up and was about seven feet out of the alley. I made a dead stop. I heard some commotion, some one holler. The truck rolled a couple of feet, then it stopped again. Somebody said 'back up.' I backed up a couple of feet, stopped the truck and pulled on the emergency, jumped out on the left side and ran around to see what was wrong. I thought that the truck caught fire or something. Then they said I hit somebody. After I got around the side I saw a boy leaning up against the brick wall, the building line on the north side of the alley." Fink further testified that when he came to a stop as he approached the east sidewalk of Kedzie avenue, the front end of his truck extended about two feet beyond the building line toward the sidewalk.

Joseph Kocanarle, one of the helpers, testified that he was walking about ten or fifteen feet to the rear of the truck as it approached the sidewalk on Kedzie avenue, and that he heard Fink blow the horn two or three times and then saw the



"As I proceeded west in that alley and just before I arrived at the sidewalk on Kebab Avenue, I was driving three or four miles per hour in first speed. Just as I was approaching the sidewalk on the east side of Kebab Avenue I blew the horn and stopped as I was getting to the edge of the alley just before I hit the sidewalk. I blew the horn about fifteen feet in the alley away from the sidewalk. I tapped it several times. I always do. On that particular morning, that is just exactly what I had been doing. When I got to the sidewalk at the end of the alley, I came to a stop, blew my horn and put the truck in first gear. After I looked both ways I proceeded out of the alley. I looked north and south. I looked left and then right. I could see to the north a couple of feet away from the building and beyond that it would be a curve of about fifteen degrees and before I started up my truck I did not see anybody coming towards me. I started up and was about seven feet out of the alley. I made a dead stop. I heard some commotion, some one holler, the truck rolled a couple of feet, then it stopped again. Somebody said 'back up.' I backed up a couple of feet, stopped the truck and pulled on the emergency, jumped out on the left side and ran around to see what was wrong. I thought that the truck caught fire or something. Then they said I hit somebody. After I got around the side I saw a boy leaning up against the brick wall, the building line on the north side of the alley." Pink further testified that when he came to a stop as he approached the east sidewalk of Kebab Avenue, the front end of his truck extended about two feet beyond the building line toward the sidewalk.

Joseph Kocemarie, one of the helpers, testified that he was walking about ten or fifteen feet to the rear of the truck as it approached the sidewalk on Kebab Avenue, and that he heard Pink blow the horn two or three times and then saw the



truck come to a stop. His testimony as to the position of the truck with respect to the sidewalk is rather uncertain.

Barney Urzndowski, another member of the crew, testified that he was walking about 20 or 25 feet behind the truck and that he heard Fink twice blow the horn about five feet from the sidewalk; that when the truck got to the sidewalk it stopped and then started slowly ahead; that he then noticed some commotion in front and saw the driver holding an injured boy in his arms.

R. S. Vrba and Frank Vrchota substantially corroborated the evidence of the other members of the crew with respect to the sounding of the horn and the stopping of the truck at or about the building line as it emerged from the alley toward Kedzie avenue.

Upon careful consideration of the evidence adduced upon the hearing we are satisfied that the court properly denied defendants' motions for a directed verdict and for judgment notwithstanding the verdict. The law is well settled in this state that it is improper to direct a verdict for the defendant where any evidence, taken as true, together with the most favorable inferences that can be drawn therefrom, tends to support the allegations of the complaint and to make out a prima facie case for the plaintiff. And the same rule applies to a motion for a verdict non obstante veredicto. Moudy v. New York, C. & St. L. R. Co., 317 Ill. App. 154; Capelle v. Chicago & N. W. Ry. Co., 280 Ill. App. 471. In considering such motions the trial court is not at liberty to consider the preponderance of the evidence or the credibility of the witnesses. The only question which it has to determine is whether there is in the record any evidence which, if true, fairly tends to prove the allegations of the complaint. The weight to be given the testimony is a question for the jury.

However, these considerations do not apply to the contention

truck come to a stop. His testimony as to the position of the truck with respect to the sidewalk is rather uncertain. Barney Urundowski, another member of the crew, testified that he was walking about 20 or 25 feet behind the truck and that he heard Link twice blow the horn about five feet from the sidewalk; that when the truck got to the sidewalk it stopped and then started slowly ahead; that he then noticed some commotion in front and saw the driver holding an injured boy in his arms. R. S. Vrba and Frank Vrchota substantially corroborated the evidence of the other members of the crew with respect to the sounding of the horn and the stopping of the truck at or about the building line as it emerged from the alley toward Kedzie avenue.

Upon careful consideration of the evidence adduced upon the hearing, we are satisfied that the court properly denied defendants' motions for a directed verdict and for judgment notwithstanding the verdict. The law is well settled in this state that it is improper to direct a verdict for the defendant where any evidence, taken as true, together with the most favorable inferences that can be drawn therefrom, tends to support the allegations of the complaint and to make out a prima facie case for the plaintiff. And the same rule applies to a motion for a verdict non obstante veredicto. Worley v. New York, N. H. & H. R. Co., 217 Ill. App. 194; Capelle v. Chicago & N. W. Ry. Co., 280 Ill. App. 471. In considering such motions the trial court is not at liberty to consider the preponderance of the evidence or the credibility of the witnesses. The only question which it has to determine is whether there is in the record any evidence which, if true, fairly tends to prove the allegations of the complaint. The weight to be given the testimony is a question for the jury. However, these considerations do not apply to the contention

that the verdict was against the manifest weight of the evidence. Since the cause will, in all probability, have to be retried we have refrained from any further discussion of the evidence than was necessary for a consideration of the issues involved, and nothing that we have said in this opinion is intended to prejudice the rights of the plaintiff upon another trial. However, from a careful reading of the record we are of opinion that on the question of defendants' negligence, the verdict is contrary to the manifest weight of the evidence, and therefore the judgment of the Superior court is reversed and the cause is remanded for another trial.

JUDGMENT REVERSED AND CAUSE  
REMANDED FOR NEW TRIAL.

Scanlan and Sullivan, JJ., concur.



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and therefore the judgment of the Superior Court is reversed  
and the case is remanded for another trial.

JUDGMENT REVERSED AND CASE  
REMANDED FOR NEW TRIAL.

Scamman and Sullivan, JJ., concur.

42658

320 I.A. 436

PETER CHRISTIAN,  
Appellee,

v.

VIRGINIA MAE CHRISTIAN,  
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

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MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In November 1942 Peter Christian filed a complaint in the Circuit court seeking a divorce from his wife Virginia Mae Christian on the ground of adultery. Personal service of summons was had on the defendant, returnable in December 1942. Thereafter, plaintiff moved for the care, custody and maintenance of the minor children born of said marriage, and January 11, 1943 the chancellor entered the following order:

"On motion of Charles A. Boyle, solicitor for plaintiff Peter Christian for custody care and maintenance of the minor children of the parties hereto, due notice having been given and said motion coming on to be heard on the contested motion calendar and the court having previously ordered an investigation by the Social Service Department and having heard testimony

"It is ordered that the plaintiff Peter Christian be and he is hereby given the care, custody and maintenance of Frances Christian, Peter Christian and Walter Christian, minor children of the parties hereto, until the further order of this court, and the plaintiff agrees to maintain said children in a suitable Catholic Home for Children.

"It is further ordered that said cause be and is hereby continued to Jan. 19-1942 as a motion of course."

The record presented is so incomplete that it does not include a copy of the bill of complaint nor indicate whether plaintiff's motion, upon which the foregoing order is predicated, was oral or supported by petition, or whether plaintiff relied upon the allegations of the complaint, which may or may not





have been verified. It further appears that when the motion was made, defendant had not answered the complaint, the parties having subsequently stipulated that the time for the filing of defendant's answer be extended to and including February 15, 1943. Neither does it appear whether defendant filed an answer to any petition that might have been presented in support of plaintiff's motion. All these matters are left entirely to conjecture.

As heretofore stated, defendant was given until February 15 to answer the complaint, but from the scant record before us it does not appear whether such an answer was filed. However, on February 24, 1943, defendant presented a petition wherein she alleged, in substance, that she was the defendant and cross-complainant in the case; that she had on February 15 filed a cross-complaint for divorce, seeking, among other relief, the sole care and custody of the three minor children, and reciting the order entered by the court on January 11, 1943 awarding the custody of the children to the plaintiff. She further alleged that at the time of the hearing on plaintiff's motion "she was mentally upset, and did not understand the full meaning of the questions put to her in connection with the custody of the said children; that since the entry of said order, much evidence has come to the knowledge of your petitioner as to the welfare of the said minor children," and she stated that the children had become ill upon learning that they were to be taken away from their mother, and were under the care of a physician who had attended them since their birth and who had advised that if the children were taken from their mother they would become seriously ill. She alleged that she had cohabited and maintained conjugal relations with her husband since the entry of the order of January 11, 1943 and prior thereto, that plaintiff admitted he did not believe the charges and allegations made in the complaint and

have been verified. It further appears that when the motion was made, defendant had not answered the complaint, the parties having subsequently stipulated that the time for the filing of defendant's answer be extended to and including February 15, 1943. Whether does it appear whether defendant filed an answer to any petition that might have been presented in support of plaintiff's motion. All these matters are left entirely to conjecture.

As heretofore stated, defendant was given until February 15 to answer the complaint, but from the court record before us it does not appear whether such an answer was filed. However, on February 24, 1943, defendant presented a petition wherein she alleged, in substance, that she was the defendant and cross-complainant in the case; that she had on February 15 filed a cross-complaint for divorce, seeking, among other relief, the sole care and custody of the three minor children, and reciting the order entered by the court on January 11, 1943 awarding the custody of the children to the plaintiff. She further alleged that at the time of the hearing on plaintiff's motion "she was mentally upset, and did not understand the full meaning of the questions put to her in connection with the custody of the said children; that since the entry of said order, such evidence has come to the knowledge of your petitioner as to the welfare of the said minor children," and she stated that the children had become ill upon learning that they were to be taken away from their mother, and were under the care of a physician who had attended them since their birth and who had advised that if the children were taken from their mother they would become seriously ill. She alleged that she had consulted and maintained contact relations with her husband since the entry of the order of January 11, 1943 and prior thereto, that plaintiff admitted he did not believe the charges and allegations made in the complaint and



knew that defendant "could not, and did not, commit adultery with anyone." There are further allegations that plaintiff is a strong, healthy and able-bodied man, well able to support petitioner and the children, and that she is without funds to employ counsel; and she asks that the order of January 11, 1943 be vacated and set aside, that she be awarded the care, custody and control of the minor children, that a suitable allowance be made for her temporary support and that of the children in accordance with the provisions of the statute, as well as a suitable allowance for her necessary expenses in conducting the suit, including attorneys' fees.

The petition was presented to the court on the 24th of February, 1943, and the following order was entered thereon:

"This matter coming on to be heard upon the verified petition of Virginia Mae Christian defendant, to vacate the order entered on to wit Jan. 19, 1943 awarding the custody of the minor children to the father, due notice having been given and the Court having heard the argument of Counsel and being otherwise advised

"Doth order that leave be and it is hereby given Henry M. Tufo to file his appearance as additional Counsel herein.

"It is further ordered that the petition of the defendant and the prayer thereof be and the same is hereby denied." This appeal is prosecuted to reverse the order denying her petition.

The principal ground urged for reversal is that her petition of February 24 was not answered and that the order denying it was entered without affording her a hearing on the merits. Plaintiff's counsel seek to justify the order by contending that the court considered the evidence presented at the hearing on plaintiff's original petition, was fully advised, and exercised its sound discretion in awarding custody



know that defendant "could not, and did not, actually  
with anyone." There are further allegations that plaintiff  
is a strong, healthy and able-bodied man, who is capable of  
petitioner and the children, and that she is a person who is  
employ counsel, and she asks that the order of January 11, 1943  
be vacated and set aside, that she be awarded the care, custody  
and control of the minor children, that a suitable allowance be  
made for her temporary support and that of the children in accordance  
with the provisions of the statute, as well as a suitable  
allowance for her necessary expenses in conducting the suit,  
including attorney's fees.

The petition was presented to the court on the 14th of  
February, 1943, and the following order was entered thereon:  
"This matter coming on to be heard upon the verified  
petition of Virginia Lee Christian defendant, to vacate the  
order entered on to wit Jan. 19, 1943 awarding the custody of  
the minor children to the father, due notice having been given  
and the court having heard the argument of counsel and being  
otherwise advised

"Both order that leave be and it is hereby given Henry  
W. Telfo to file his appearance as additional counsel herein.  
"It is further ordered that the petition of the defendant  
and the prayer thereof be and the same is hereby denied."  
This appeal is presented to vacate the order denying the  
petition.

The principal ground urged for reversal is that her  
petition of February 14 was not answered and that the order  
denying it was entered without hearing her or hearing on the  
merits. Plaintiff's counsel seek to justify the order by  
contending that the court considered the evidence presented  
at the hearing on plaintiff's original petition, was fully  
advised, and exercised its sound discretion in awarding custody

of the children to the plaintiff on January 11, 1943.

The order entered on the last-mentioned date was prepared by counsel in longhand and, like the record presented, is defective in several essential respects. There is nothing before us indicating that testimony adduced upon the hearing January 11, 1943 would have justified a finding that defendant was unfit to assume the care, custody and maintenance of the minor children, and in fact the order makes no recital whatsoever as to her unfitness. The report of the investigation by the Social Service Department is not incorporated in the record, even though it was competent evidence, and the order does not recite the findings of that agency, nor the recommendation made. Moreover, defendant's petition of February 24 asking that the prior order be vacated contained allegations of plaintiff's admission that he did not believe the truth of the charges made in his complaint and knew that defendant "could not, and did not, commit adultery with anyone." Under the circumstances she was entitled to a hearing as to the merits of her petition and the record does not indicate that she was afforded that opportunity. Besides asking for the vacation of the order of January 11, 1943, she sought custody of the minor children, suitable allowance for her support and that of the children under the statute, and she further asked for necessary expenses incurred in conducting the suit, and attorneys' fees. The order entered denied her all these requests.

To deprive a mother of the custody of minor children upon a record which does not disclose a full opportunity to be heard, and especially under an order which fails to disclose that any evidence was adduced indicating that she was an unfit person to assume the custody and control of the children and no finding in the order that she was such a person, is too drastic a procedure to be affirmed.

Therefore, the order of the Circuit court of February 25

of the children to the plaintiff on January 11, 1943.

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To deprive a mother of the custody of minor children upon a record which does not disclose a full opportunity to be heard, and especially under an order which fails to disclose that any evidence was adduced indicating that she was an unfit person to assume the custody and control of the children and no finding in the order that she was such a person, is too drastic a procedure to be affirmed.

Therefore, the order of the Circuit Court of February 25



denying her petition is reversed, and the cause is remanded with directions that plaintiff be required to answer the petition within a time fixed by the court, and that such further proceedings be had as are herein indicated.

ORDER REVERSED AND CAUSE REMANDED  
WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

denying her petition is reversed, and the cause is remanded with directions that plaintiff be required to answer the petition within a time fixed by the court, and that such further proceedings be had as are herein indicated.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Seaman and Sullivan, JJ., concur.

THE TRUST COMPANY OF CHICAGO,  
Administrator of the Estate  
of AUGUST H. BRAATZ, Deceased,  
Appellee,

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

WALTER J. CUMMINGS and DANIEL C.  
GREEN, as Receivers, etc.,  
et al., doing business as  
CHICAGO SURFACE LINES,  
Appellants.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit under the Injuries Act to recover damages alleged to have been sustained by the next of kin of August H. Braatz, who was struck and killed by an eastbound street car on Montrose avenue near the crosswalk of Damen avenue, Chicago. Trial by jury resulted in a verdict and judgment for \$2,500, from which defendants have taken an appeal.

It appears from the record that Montrose avenue, running east and west and 42 feet 6 inches in width, intersects Damen avenue, which is 38 feet 4 inches wide, at right angles. Street car tracks run along both streets and stop-and-go lights are located on two corners of the intersection.

Braatz, aged 83, lived with his daughter and her husband, Ruth and Walter Norden, in a home owned by them on the east side of Damen avenue about one and one-half blocks south of Montrose avenue. He had retired from any active occupation and his sole source of income was \$27 old-age assistance. About 4:30 in the afternoon of December 11, 1940 he left the Norden home and walked north along the east side of Damen avenue toward the Montrose avenue intersection. His daughter had told her husband, Walter Norden, "to go out and get him," and Norden testified that in an effort to overtake him he had proceeded to about 125 or 150 feet south of the intersection when the accident occurred. According to his testimony he observed Braatz about the time



APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

THE TRUST COMPANY OF CHICAGO,  
Administrator of the Estate  
of AUGUST H. BRATZ, Deceased,  
Appellee,  
v.  
WALTER J. NORDEN and DANIEL G.  
GREEN, as Receivers, etc.,  
et al., doing business as  
CHICAGO SURFACE LUMBER,  
Appellants.

MR. PRESIDING JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.  
Plaintiff brought suit under the injuries let to recover  
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August H. Bratz, who was struck and killed by an eastbound  
street car on Montrose Avenue near the crosswalk of Damen  
Avenue, Chicago. Trial by jury resulted in a verdict and  
judgment for \$2,500, from which defendants have taken an appeal.  
It appears from the record that Montrose Avenue, running  
east and west and 45 feet 6 inches in width, intersects Damen  
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car tracks run along both streets and stop-and-go lights are  
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Norden, "to go out and get him," and Norden testified that in  
an effort to overtake him he had proceeded to about 125 or 130  
feet south of the intersection when the accident occurred.  
According to his testimony he observed Bratz about the time

that he reached the curb before crossing the intersection. He stated that Braatz hesitated, glanced west and east, and then stepped down from the curb and proceeded to walk north; that he (Norden) looked at the traffic light and observed that it was green for north-and-south traffic and remained green until Braatz had reached the space between the two street-car tracks on Montrose avenue; that there was an eastbound street car waiting on the west side of the intersection and also a westbound street car waiting on the east side, with its front end approximately even with the east building line; that the westbound car started on the yellow light when Braatz was about two feet from it; that he then observed Braatz turn and start for the south curb, angling somewhat to the east, and as he did so Braatz looked to the west and made several lively steps, but the right front end of the eastbound street car struck him; that after the impact the car stopped about 30 feet east of the crosswalk, probably 15 feet from the east building line, with its rear end about two feet east of the northbound track in Damen avenue; and he stated that he heard no gong sounded by either street car. Following the accident Braatz was taken to a hospital and died shortly thereafter.

Although several witnesses testified for defendants upon the hearing, the only actual eyewitness to the complete accident was Anton Hollinger, the motorman of the one-man eastbound street car which struck the deceased. He was called by plaintiff under section 60 of the Civil Practice Act (par. 184, ch. 110, Ill. Rev. Stat. 1941) for cross-examination, and no attempt was made to recall him to the stand when defendants were putting on their defense. Hollinger had been employed by the Chicago Surface Lines for approximately five years, for two of which he served as motorman. He testified that "I wouldn't say the car struck him. The right corner post of the street car touched his arm as the car



that he reached the curb before crossing the intersection. He stated that Bratz hesitated, glanced west and east, and then stepped down from the curb and proceeded to walk north; that he (Norden) looked at the traffic light and observed that it was

green for north-and-south traffic and remained green until Bratz had reached the space between the two street-car tracks on Monroe Avenue; that there was an eastbound street car waiting on the west side of the intersection and also a westbound street car waiting on the east side, with its front end approximately even with the east building line; that the westbound car started on the yellow light when Bratz was about two feet from it; that he then observed Bratz turn and start for the south

curb, angling somewhat to the east, and as he did so Bratz looked to the west and made several lively steps, but the right front end of the eastbound street car struck him; that after the impact the car stopped about 30 feet east of the crosswalk, probably 15 feet from the east building line, with its rear end about two feet east of the northbound track in Damen Avenue; and he stated that he heard no gong sounded by either street car. Following the accident Bratz was taken to a hospital and died shortly thereafter.

Although several witnesses testified for defendants upon the hearing, the only actual eyewitness to the complete accident was Anton Hollinger, the motorman of the one-man eastbound street car which struck the deceased. He was called by plaintiff under section 60 of the Civil Practice Act (par. 184, ch. 110, Ill. Rev. Stat. 1941) for cross-examination, and no attempt was made to recall him to the stand when defendants were putting on their defense. Hollinger had been employed by the Chicago Surface Lines for approximately five years, for two of which he served as motor-man. He testified that "I wouldn't say the car struck him. The right corner post of the street car touched his arm as the car



stopped. It touched his left arm. He was facing north. His hands touched the doors of the car as the car went past him, coming to a stop. There was no sound from the impact. He was not knocked down. He ended up in the street. He fell down. The street car touched him as it stopped. He sort of stood there for a moment or two, and then he fell over on his side. I opened the doors and got out and picked the man up. I would say he was bleeding slightly. It was the right side of his head. I don't say it was smashed in. It didn't look like it. I could not see the bones protruding. It was all bloody." As against this evidence Norden had testified that he heard an awful thump as the car struck Braatz and that the right front side of his head was crushed. Hollinger further testified that there was no other traffic at the intersection at the time of the accident, that the streets were dry and the visibility good; that when he first saw Braatz crossing Montrose avenue, the street car which he was operating was about to enter the crosswalk on the west side of Damen avenue; that Braatz was standing on the curb and when the street car was about even with the east crosswalk, Braatz stepped into the street from the south curb and walked north into Montrose avenue. "When I saw him stepping from the south curb down into the street, I sounded the gong and applied the brakes. I knew then there was going to be an accident. The width of the street between the south rail of the east bound tracks to the south curb is about 5 feet. When the deceased stepped off the curb he was about 15 feet, diagonal, from my street car. He continued walking all the time until the impact. He was walking north and looking north. My car was making a noise and I was clanging the bell and applying the brakes and he kept looking straight ahead. He didn't look in my direction at all. He kept on walking."

Plaintiff's contention that Braatz had the green lights

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crushed. Hollinger further testified that there was no other

traffic at the intersection at the time of the accident, that the streets were dry and the visibility good; that when he first saw Bratz crossing Monroe Avenue, the street car which he was

operating was about to enter the crosswalk on the west side of

Damen Avenue; that Bratz was standing on the curb and when the street car was about even with the east crosswalk, Bratz stepped

into the street from the south curb and walked north into

Monroe Avenue. "When I saw him stepping from the south curb down into the street, I sounded the gong and applied the brakes. I knew then there was going to be an accident. The width of the

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sounding the bell and applying the brakes and he kept looking

straight ahead. He didn't look in my direction at all. He kept

on walking."

Plaintiff's contention that Bratz had the green lights



is amply sustained by the evidence. Norden testified, and it is plaintiff's contention, that after Braatz had entered upon the tracks along Montrose avenue, the westbound street car which had come to rest on the east side of the intersection, started with the yellow light and thus prevented Braatz from continuing northward; that when he was cut off from proceeding northward, he turned around and in trying to reach the curb from which he had started, he was struck by the eastbound car operated by Hollinger. Defendants denied that there was any westbound car at the intersection immediately preceding the accident, but this conflict in the evidence was presented to the jury as an issue of fact, and the circumstances leading to the accident as related by Norden are at least as reasonable an explanation of the occurrence as any other theory. Upon the record presented we would not be justified in holding, as defendants contend, that the verdict was against the manifest weight of the evidence. All the facts were presented to the jury and there is ample testimony to sustain the verdict.

Defendants' principal other contention is that the damages awarded are excessive. Their counsel say that damages recoverable under the Injuries Act for wrongful death must be confined to pecuniary loss sustained by the husband or wife and next of kin and that all other elements of damage abate with death. It is argued that since Braatz's sole income was \$27 a month and his life expectancy at the age of 83, according to the American Experience Table of Mortality (41 C. J. 216) was only 3.39 years, the jury was not warranted in assessing more than nominal damages. The undisputed evidence is that Braatz, although 83 years of age, was in excellent health at the time of the accident. He had no noticeable infirmities, his hearing, eyesight and memory were all good, and he had not required any medical care for many years. At the time of his death he had lived with the Nordens for about six years, the last three years in a two-story six-room frame



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building which the Nordens had purchased. There is evidence that Braatz was the general handy man around the home. He attended to necessary repairs, painted the fences, performed chores about the house, watered and mowed the lawns, raked the leaves, attended to all the outside work, looked after the furnace, carried out the ashes and helped his daughter with such housework as operating the vacuum cleaner and other inside chores. In addition to these various services he occasionally gave his daughter money from his pension allowance. She testified that in the year preceding his death he had given her approximately \$300, and shortly before his death he had given her some money to help her pay current bills. Under the authorities in this state the law presumes pecuniary loss from the fact of death to the "next of kin." "The poverty, wealth, helplessness or dependence of the lineal next of kin is immaterial on the question of the amount of the recovery under this statute [Injuries Act, Ill. Rev. Stat. 1941, ch. 70, secs. 1 and 2]. That feature is not at all to be considered in measuring or estimating the loss sustained, or in determining the liability, in case of lineal kindred, when there is death caused by a wrongful act." C., P. & St. L. R. R. Co. v. Woolridge, 174 Ill. 330. In Dukeman v. C., C., & St. L. R. R. Co., 237 Ill. 104, suit was brought by the administrator to recover for the death of plaintiff's decedent, who was his mother. Decedent was 65 years of age and left a husband 72 years old, who survived her by only a few hours, and two sons, one of whom was married and lived with his family, and the other unmarried and living with his father and mother. There was evidence that the deceased occasionally helped out at the home of her married son when his wife was sick. In affirming the lower court's refusal to instruct the jury that only nominal damages could be awarded, the court said: "\* \* \* the rule is established in this State that where the next of kin sustained a lineal relation to the deceased the law presumes



building which the Nordens had purchased. There is evidence that Brata was the general handy man around the home. He attended to necessary repairs, painted the fences, performed chores about the house, watered and mowed the lawns, raked the leaves, attended to all the outside work, looked after the furnace, carried out the ashes and helped his daughter with such housework as operating the vacuum cleaner and other inside chores. In addition to these various services he occasionally gave his daughter money from his pension allowance. She testified that in the year preceding his death he had given her approximately \$300, and shortly before his death he had given her some money to help her pay current bills. Under the authorities in this state the law presumes pecuniary loss from the fact of death to the "next of kin." "The poverty, wealth, helplessness or dependence of the lineal next of kin is immaterial on the question of the amount of the recovery under this statute [Injuries Act, Ill. Rev. Stat. 1941, ch. 70, secs. 1 and 2]. That feature is not at all to be considered in measuring or estimating the loss sustained, or in determining the liability, in case of lineal kindred, when there is death caused by a wrongful act." G. P. & St. L. R. Co. v. Woolridge, 174 Ill. 330. In Brakeman v. C. & St. L. R. Co., 237 Ill. 104, suit was brought by the administrator to recover for the death of plaintiff's decedent, who was his mother. Decedent was 65 years of age and left a husband 72 years old, who survived her by only a few hours, and two sons, one of whom was married and lived with his family, and the other unmarried and living with his father and mother. There was evidence that the deceased occasionally helped out at the home of her married son when his wife was sick. In affirming the lower court's refusal to instruct the jury that only nominal damages could be awarded, the court said: " \* \* the rule is established in this State that where the next of



some substantial damages from the relationship alone." (Citing C., P. & St. L. R. R. Co. v. Woolridge, *supra*, and other cases.)

In the case at bar Braatz left six children as his direct lineal descendants, and the suit was brought by the administrator not only on behalf of Mrs. Norden, with whom Braatz lived, but on behalf of all of the next of kin. For these reasons we are of opinion that defendants' contention that plaintiff was entitled to recover only nominal damages is not well taken. However, the sum of \$2,500, in view of all the circumstances, seems to us excessive. A judgment of \$1,500 would more nearly represent the pecuniary loss suffered by the next of kin, considering the small income and life expectancy of deceased.

Defendants' remaining complaint relates to the refusal of the court to give instructions 23 and 24 pertaining to the measure of damages and presumptions of pecuniary loss. The substance of these instructions had already been covered in other instructions and therefore the court properly refused them.

If plaintiff is willing to consent to a remittitur of \$1,000, within ten days, judgment will be entered here in its favor for \$1,500. Otherwise, judgment will be reversed and the cause remanded for a new trial.

AFFIRMED UPON REMITTITUR OF \$1,000  
BY PLAINTIFF WITHIN TEN DAYS, IN  
WHICH CASE JUDGMENT HERE FOR PLAINTIFF  
FOR \$1,500; OTHERWISE JUDGMENT  
REVERSED AND CAUSE REMANDED.

Sullivan and Scanlan, JJ., concur.

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REVERSED AND CAUSE REMANDED.

Sullivan and Seaman, JJ., concur.

42702

WALTER E. McKAY et al.,  
Appellees,

v.

JAMES A. HANNAH, etc., et al.,  
Appellant.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Walter E. McKay and Edwin W. Lambert, who resided in Joliet, Illinois, were employed in the Chicago yards of the Elgin, Joliet & Eastern Railway Company, and together with Ralph Crowder they were riding to their place of employment in an automobile owned and driven by Robert Sullivan. They had left Joliet at about 10:00 o'clock on the evening of Feb. 17, 1941, in subzero weather, and were driving toward Chicago in a northeasterly direction on Southwest highway, known as U. S. Route No. 7. Sullivan was at the wheel, with Crowder seated beside him; McKay and Lambert occupied the rear seat. Shortly after they had crossed a viaduct south of 99th street, the car collided with defendant's heavily loaded gasoline truck and trailer, parked in the outer lane for northeast-bound traffic on the highway. Sullivan was killed in the accident and McKay and Lambert were severely injured. The latter two brought separate suits for damages, which were consolidated by order of court and tried together before a jury, resulting in a verdict awarding each plaintiff the sum of \$5,000. At the close of all the evidence defendant had moved for a directed verdict, which motion was overruled, and after the jury returned its verdict in favor of plaintiffs, defendant made a motion for judgment notwithstanding the verdict as to both plaintiffs, which was likewise overruled. This appeal is prosecuted from the order denying the motion for judgment notwithstanding the verdict.



WALTER E. MCKAY et al.,  
Appellants,  
v.  
JAMES A. HILMAN, et al.,  
Appellees.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF ILLINOIS  
IN AND FOR COOK COUNTY.

MR. PRESIDING JUSTICE FRANK DELANEY delivered the opinion of the court.

Walter E. McKay and Edwin E. Lambert, who resided in Joliet, Illinois, were employed in the Chicago yards of the Elgin, Joliet & Eastern Railway Company, and together with Ralph Crowder they were riding to their place of employment in an automobile owned and driven by Robert Sullivan. They had left Joliet at about 10:00 o'clock on the evening of Feb. 17, 1941, in adverse weather, and were driving toward Chicago in a northeasterly direction on Southwest Highway known as U. S. Route No. 7. Sullivan was at the wheel, with Crowder seated beside him; McKay and Lambert occupied the rear seat. Shortly after they had crossed a viaduct south of 55th Street, the car collided with defendant's heavily loaded gasoline truck and trailer, parked in the outer lane for northeast-bound traffic on the highway. Sullivan was killed in the accident and McKay and Lambert were severely injured. The latter two brought separate suits for damages, which were consolidated by order of court and tried together before a jury, resulting in a verdict awarding each plaintiff the sum of \$25,000. At the close of all the evidence defendant had moved for a directed verdict, which motion was overruled, and after the jury returned its verdict in favor of plaintiff, defendant made a motion for judgment notwithstanding the verdict as to both plaintiffs, which was likewise overruled. This appeal is prosecuted from the order denying the motion for judgment notwithstanding the verdict.

It appears from the evidence that Sam Petrone was returning defendant's truck and trailer containing some 7,000 gallons of gasoline to its garage in Chicago, and after coming down the incline from the viaduct and crossing 99th street his motor suddenly failed him and he stopped his equipment in the outer or right-hand lane of the four-lane highway. It was a dark night and there were no lights along the highway in the vicinity of the accident. Petrone testified that his headlights and marker lights, both side and rear were all lighted, and that after placing an electric flare some 75 feet to the rear of his trailer, he proceeded to a nearby tavern to telephone his garage that the motor of his truck had failed. After completing the call he had a conversation in the tavern with one Louis Page, who later testified as one of plaintiffs' witnesses, and was about to leave the tavern with Page when a woman entered and told him of the accident. He states that before the accident he looked out from the tavern and noticed the lights on his equipment still burning and clearly visible. Two other witnesses testifying on behalf of defendant offered corroborating evidence as to the lighting on and about the truck and trailer, and some seven of plaintiffs' witnesses testified on the subject of visibility and lighting, which constitutes the principal controversy in the case. Defendant concedes that his case "stands or falls on the proposition of whether or not the \*\*\* equipment was properly lighted while on the highway." He does not contend or argue that the verdict is contrary to the manifest weight of the evidence, but advances the contention that since all the witnesses on both sides testified in substance that the equipment was lighted while parked on the highway, the accident must have resulted from the negligence of the driver of the car in which plaintiffs were riding, and therefore the court should have

It appears from the evidence that the witness was returning defendant's truck and trailer containing some 7500 gallons of gasoline to its garage in Chicago, and after coming down the incline from the viaduct and crossing 95th street his motor suddenly failed him and he stopped his equipment in the outer or right-hand lane of the four-lane highway. It was a dark night and there were no lights along the highway in the vicinity of the accident. Petrone testified that his headlights and marker lights, both side and rear were all lighted, and that after placing an electric flare some 75 feet to the rear of his trailer, he proceeded to a nearby tavern to telephone his garage that the motor of his truck had failed. After completing the call he had a conversation in the tavern with one Louis Page, who later testified as one of plaintiffs' witnesses, and was about to leave the tavern with Page when a woman entered and told him of the accident. He states that before the accident he looked out from the tavern and noticed the lights on his equipment still burning and clearly visible. Two other witnesses testifying on behalf of defendant offered corroborating evidence as to the lighting on and about the truck and trailer, and some seven of plaintiffs' witnesses testified on the subject of visibility and lighting, which constitutes the principal controversy in the case. Defendant concedes that his case "stands or falls on the proposition of whether or not the \*\*\* equipment was properly lighted while on the highway." He does not contend or argue that the verdict is contrary to the manifest weight of the evidence, but advances the contention that since all the witnesses on both sides testified in substance that the equipment was lighted while parked on the highway, the accident must have resulted from the negligence of the driver of the car in which plaintiffs were riding, and therefore the court should have



directed a verdict for defendant at the close of plaintiffs' evidence, or allowed defendant's motion for judgment notwithstanding the verdict.

Beside Petrone, defendant produced as witnesses Royal G. Stephenson and his wife Alice, who had passed the truck prior to the accident to purchase fuel oil at a gas station, and again on their way back. Both corroborated defendant's testimony that the tail and marker lights could be plainly seen.

The evidence adduced by plaintiffs' witnesses is in many respects in conflict with defendant's evidence and may be briefly summarized as follows. Betty Gentleman, who lived nearby, testified that on looking out of the window she saw the headlights on the truck, and stated that "They were not very bright when he first parked there, but they got dimmer later on. They continued to get dimmer as time went by. Cars were coming from the west going toward Chicago, that is, northeast. The brakes would squeal as they would have to come over to the other lane of traffic to get by the truck. \*\*\* There was a small white light that I saw on the pavement which was near the middle of the highway, near the middle of the lane toward the side the truck was on, \*\*\* about 30 or 35 feet from the rear of the truck. This light was similar to a small match flame. \*\*\* I again observed the headlights on the truck and you could hardly see them. \*\*\* I saw no other flare than the one mentioned above until after the police arrived and set out flares."

Her husband, James Gentleman, testified that there was a small light down the highway, about 15 feet behind the car that was wrecked, or approximately 30 or 35 feet to the rear of the trailer. "It was right in the center of the highway and was an electric lamp or torch. It was a very faint light. It was a white light from the side I saw but from the other

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Her husband, James Gentlesman, testified that there was a small light down the highway, about 15 feet behind the car that was wrecked, or approximately 30 or 35 feet to the rear of the trailer. "It was right in the center of the highway and was an electric lamp or torch. It was a very faint light. It was a white light from the side I saw had from the other



side I couldn't say whether it was red or what color it was."

Louis Page, who had met Petrone in the tavern before the accident, testified that he saw no lights on the equipment and that the flare which was placed about 30 feet behind the trailer in the center of the highway was dim.

Archie E. Moran, squad leader for the Illinois State Police, testified that he received a call in his squad car by radio and proceeded to the site of the accident with Sergeant Kennedy, arriving there shortly before 11:00 o'clock. He stated that the headlights on the truck were not lighted. "After we swung by the truck, we pulled over in the clear on the shoulder \*\*\*. Then we went out on the pavement which is a 40-foot pavement \*\*\*. On the rear of the truck \*\*\* there were three bar lights on the top of the tank. They were not very bright as they were dirty. There was an electric bomb approximately 35 feet to the rear of the truck in the center of the pavement. It was almost burned out at that time. There are supposed to be two red lenses in these bombs but there was only one in this. \*\*\* The light was practically burned out, just about as bright as a cigar or cigarette. I took the bomb and still have it. I looked for other bombs or flares, etc., on the pavement and there was no other electric lamp on the pavement at any point near that truck. \*\*\* At that time the requirement was that a bomb be set out 100 feet to the rear, one alongside the unit and one 100 feet to the front. I investigated 100 feet to the rear and found no bombs, nor did I find one in the front. The only one was on the roadway side, the west side. In the cab we found another bomb but the battery was dead. These were the only two bombs. I asked the driver of the truck as to the third bomb and he said he hadn't any. I measured the truck as to its position on the highway with reference to



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the right-hand edge of the cement pavement and the rear wheel, which was the dual wheels on the semi-trailer, was six foot six inches and the front wheel, the front axle, which is a single tire unit, was seven feet from the curbing of the pavement. Opposite the truck, the shoulder on the southeast side of that highway was about 13 or 14 feet. It was considerably below zero that night. That particular shoulder is graded and the State has that just for any emergency. It's that wide so you can pull off there in an emergency. In that weather, it was hard. The ground was in good shape. At its widest point, a truck is allowed only eight foot width."

Wilbur Kennedy, who accompanied Moran, stated that the electric bomb was about 30 or 35 feet to the rear of the truck by actual measurement, and otherwise corroborated Moran's testimony relative to the position of the truck on the highway and the absence of flares in front and on the side of the truck. With respect to the one signal bomb placed about 35 feet to the rear of the truck, Kennedy testified that the red reflector glass was broken, showing a white light instead of red, and that the group lights on the rear of the truck were lighted but the glass was dirty and they were not very bright. Kennedy related a conversation with Petrone in which he had asked the latter why he was out on the highway without proper flares, to which Petrone replied that "he had told his garage foreman about that a couple of days before, and he told him to go ahead and drive it or quit." Kennedy also stated that as they approached the scene of the accident the headlights on the truck appeared to be out and the squad car nearly passed by the equipment.

On direct examination Petrone had taken the position that he did not consider it safe to pull the large equipment onto the shoulder of the road for fear of overturning and setting



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On direct examination Patrone had taken the position that he did not consider it safe to pull the large equipment onto the shoulder of the road for fear of overturning and setting



fire to the gasoline contents of the trailer, but later he testified that "I am trying to refresh my memory, but don't believe I made an effort to get it towards the outside lane of this northwest direction of the Southwest Highway."

In addition to the foregoing evidence plaintiffs themselves testified, without contradiction, that Sullivan was a very careful driver, that he was proceeding along the highway at a moderate rate of speed, that he had left the front window of the car open so as to avoid frosting and thus give him good visibility through the windshield, and that there had been no warning of the accident until Sullivan suddenly applied the brakes, about 30 feet back of the trailer. The crash ensued immediately thereafter.

Plaintiffs rely in part on a violation of the statutes requiring safeguards on parked vehicles along public highways after sunset. Section 218 of the Motor Vehicles act (Ill. Rev. Stat. 1941, ch. 95-1/2) contains the following provision: "Whenever any motor vehicle \*\*\* and its lighting equipment are disabled during the period when lighted lamps must be displayed on vehicles and such motor vehicle cannot immediately be removed from the main traveled portion of a highway outside of a business or residence district, the driver or other person in charge of such vehicle shall cause such flares, lanterns, or other signals to be lighted and placed upon the highway, one at a distance of approximately 100 feet in advance of such vehicle, one at a distance of approximately 100 feet to the rear of the vehicle, and the third upon the roadway side of the vehicle, except that if the vehicle is transporting flammables three red reflectors may be so placed in lieu of such other signals and no open burning flare shall be placed adjacent to any such last mentioned vehicle." The first paragraph of the same section provides that "No person shall operate any motor vehicle \*\*\* upon a highway outside of a business or residence district at any time from

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sunset to sunrise unless there shall be carried in such vehicle a sufficient number of flares, not less than three or electric lanterns or other signals capable of continuously producing three warning lights each visible from a distance of at least 500 feet for a period of at least 12 hours, except that a motor vehicle transporting flammable liquid may carry red reflectors having a minimum diameter of six inches in place of the other signals above mentioned."

The evidence discloses that Petrone carried only two electric bombs instead of three. The battery of one bomb, found in the truck, was burned out, and the one used by Petrone was so weak as to produce a light "similar to a small match flame" or "just about as bright as a cigar or cigarette," and the red reflector glass was broken, producing an almost invisible white light. There is considerable conflict in the evidence about the lighting system on the truck, which was described by some of the witnesses as "dim," "faint" and "dirty." There is further evidence indicating that defendant's truck and trailer were parked six or seven feet to the left of the right edge of the outside lane, constituting an obstruction to both lanes used for northeast traffic and creating an extremely dangerous hazard on a dark highway which motorists could not well escape. Plaintiffs were entitled to have all these facts and circumstances submitted to the jury on the question of negligence, and we are satisfied from a careful examination of the record that the evidence adduced made a prima facie case.

The law is well settled in this state that it is improper to direct a verdict for the defendant where any evidence, taken as true, together with the most favorable inferences that can be drawn therefrom, tends to support the allegations of the complaint and to make out a prima facie case for the plaintiff. Moudy v. New York C. & St. L. R. Co., 317 Ill. App. 154; Capelle v. Chicago



subject to surprise and as there shall be carried in such vehicle a sufficient number of flares, not less than three or electric lanterns or other signals capable of continuously producing three warning lights each visible from a distance of at least 500 feet for a period of at least 12 hours, except that a motor vehicle transporting flammable liquid may carry red reflectors having a minimum diameter of six inches in place of the other signals above mentioned."

The evidence discloses that petrons carried only two electric bombs instead of three. The battery of one bomb, found in the truck, was burned out, and the one used by Petrons was so weak as to produce a light "similar to a small match flame" or "just about as bright as a cigar or cigarette," and the red reflector glass was broken, producing an almost invisible white light. There is considerable conflict in the evidence about the lighting system on the truck, which was described by some of the witnesses as "dim," "faint" and "dirty." There is further evidence indicating that defendant's truck and trailer were parked six or seven feet to the left of the right edge of the outside lane, constituting an obstruction to both lanes used for northeast traffic and creating an extremely dangerous hazard on a dark highway which motorists could not well escape. Plaintiffs were entitled to have all these facts and circumstances submitted to the jury on the question of negligence, and we are satisfied from a careful examination of the record that the evidence adduced made a prima facie case.

The law is well settled in this state that it is improper to direct a verdict for the defendant where any evidence, taken as true, together with the most favorable inferences that can be drawn therefrom, tends to support the allegations of the complaint and to make out a prima facie case for the plaintiff. Wondy v. New York C. & St. L. R. Co., 317 Ill. App. 154; Capelle v. Chicago

& N. W. Ry. Co., 280 Ill. App. 471. And the same rule applies to a motion for a verdict non obstante veredicto. A motion to instruct the jury for defendant is in the nature of a demurrer to the evidence, and the testimony so demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. McCune v. Reynolds, 288 Ill. 188. In considering such a motion the trial court is not at liberty to consider the preponderance of the evidence or the credibility of the witnesses. The only question which it has to determine is whether there is in the record any evidence which, if true, fairly tends to prove the allegations of the declaration. The weight to be given the testimony is a question for the jury. The same considerations are involved in determining a motion for judgment notwithstanding the verdict. Under the circumstances it would have been improper for the court to usurp the function of the jury and weigh the evidence in the case at bar. All the facts available were properly presented to the jury.

Defendant complains of three instructions given on behalf of plaintiffs relating to the provisions of the statute with respect to safeguarding disabled equipment parked on the highway after sundown by means of lighted lamps required to be placed in the front, at the rear and to the side of the vehicle. It is urged that the provisions of the statute are applicable only when the lighting equipment becomes disabled, and counsel contend that according to the undisputed testimony of all the witnesses the "lighting equipment was not disabled but was in working order, plainly visible and seen by every witness who took the witness stand in the trial court." While it is true that the rear and marker lights were lighted, there is considerable evidence that they were dim, faint and so impaired by the cold weather as to be scarcely visible. Petrone's testimony indicates that the



4 N. W. Ry. Co., 280 Ill. App. 471. And the same rule applies to a motion for a verdict non obstante veredicto. A motion to instruct the jury for defendant is in the nature of a demurrer

to the evidence, and the testimony so demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. McGuire v. Reynolds,

208 Ill. 188. In considering such a motion the trial court is not at liberty to consider the preponderance of the evidence or the credibility of the witnesses. The only question which it has to determine is whether there is in the record any evidence

which, if true, fairly tends to prove the allegations of the defendant. The weight to be given the testimony is a question for the jury. The same considerations are involved in determining

a motion for judgment notwithstanding the verdict. Under the circumstances it would have been improper for the court to usurp the function of the jury and weigh the evidence in the case at bar. All the facts available were properly presented to the jury. Defendant complains of these instructions given on behalf

of plaintiff's relating to the provisions of the statute with respect to safeguarding disabled equipment parked on the highway after sundown by means of lighted lamps required to be placed in the front, at the rear and to the side of the vehicle. It is urged that the provisions of the statute are applicable only when the lighting equipment becomes disabled, and counsel contend that according to the undisputed testimony of all the witnesses the "lighting equipment was not disabled but was in working order, plainly visible and seen by every witness who took the witness stand in the trial court." While it is true that the rear and marker lights were lighted, there is considerable evidence that they were dim, faint and so impaired by the cold weather as to be scarcely visible. Petrone's testimony indicates that the



impairment of the lighting system was due to a weak battery. In attempting to explain why he had not moved his equipment farther to the right of the pavement or on the shoulder immediately adjacent thereto, he testified that after his motor failed the equipment stopped within a few feet. He was then going 12 or 15 miles an hour and threw out his clutch in an effort to get the car to coast, but "It stopped regardless of whether the clutch was in or out." He had a self starter on the truck which derived its power from the batteries. The self starter would not work, and it may be inferred from his testimony that his batteries were either weak or frozen. If they were weak when the truck stopped and became weaker as it stood there for upwards of 20 minutes in subzero weather, it is conceivable that the lighting became progressively dimmer, as several of the witnesses testified, so that eventually it failed to serve its purpose of warning oncoming traffic. In these circumstances it became all the more important to have bright and efficient warning lights placed along the highway, as provided by statute, and the court properly apprised the jury of the statutory requirements with respect to disabled vehicles parked on a dark highway. The following comment of the court in the Capelle case, supra, is applicable to the situation in this proceeding: "In furtherance of the general principle that it is preferable that cases involving questions of fact should be disposed of on their merits by a jury, rather than upon formal motions, a trial court after denying a motion for an instructed verdict for defendant, at the close of plaintiff's evidence and again at the close of all the evidence, should not render nugatory the verdict of a jury returned on disputed questions of fact, by rendering a judgment non obstante veredicto in favor of such defendant."

Accordingly we think the court properly overruled defendant's motion for judgment notwithstanding the verdict, and the order is therefore affirmed.

ORDER AFFIRMED.

Malan and Sullivan, JJ., concur.

testimony of the witness who was in a dark battery, in attempting to explain why he had not moved his equipment further to the right of the pavement or on the shoulder immediately adjacent thereto, he testified that after his motor failed the equipment stopped within a few feet. He was then going in or 15 miles an hour and threw out his clutch in an effort to get the car to coast, but "it stopped regardless of whether the clutch was in or out." He had a self starter on the truck which derived its power from the batteries. The self starter would not work, and it may be inferred from his testimony that his batteries were either weak or frozen. If they were weak then the truck stopped and became swamped as it stood there for periods of 20 minutes in inclement weather, it is conceivable that the lighting became progressively dimmer, as several of the witnesses testified, so that eventually it failed to serve its purpose of warning oncoming traffic. In these circumstances it became all the more important to have bright and efficient warning lights placed along the highway, as provided by statute, and the court properly applied the law of the statutory requirements with respect to disabled vehicles parked on a dark highway. The following comment of the court in the Calville case, supra, is applicable to the situation in this proceeding: "In furtherance of the general principle that it is preferable that cases involving questions of fact should be disposed of on their merits by a jury rather than upon formal motions, a trial court after denying a motion for an instructed verdict for defendant, at the close of plaintiff's evidence and again at the close of all the evidence, should not render mandatory the verdict of a jury returned on disputed questions of fact, by rendering a judgment that certain vehicles is in favor of such defendant."

Accordingly we think the court properly overruled defendant's motion for judgment notwithstanding the verdict, and the order is therefore affirmed.



41368

SONIA SWIRSKY, Administratrix of the  
Estate of MEYER S. SWIRSKY, Deceased,  
Appellee,

v.

MILK WAGON DRIVERS' UNION, LOCAL 753,  
INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, STABLEMEN AND  
HELPERS OF AMERICA; ROBERT G. FITCHIE;  
JAMES G. KENNEDY; STEVE C. SUMNER;  
FRED C. DAHMS; F. RAY BRYANT; ALVIN F.  
RICHARDS; JOSEPH L. PATTERSON; HENRY  
WEBER; THOMAS HAGGERTY; PETER HOBAN  
and GUS MOLINE,

Appellants.)

215  
107  
APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An amended complaint in the nature of a bill in chancery was filed by plaintiff. The trial court entered the following judgment order:

"This cause coming on to be heard upon the motion of the plaintiff, Sonia Swirsky, as Administratrix of the Estate of Meyer S. Swirsky, deceased, by Myron E. Wisch, her attorney, for summary judgment in favor of the plaintiff and against the defendants, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Robert G. Fitchie, James G. Kennedy; Steve C. Sumner; Fred C. Dahms; F. Ray Bryant; Alvin F. Richards; and Joseph L. Patterson; and each of them, pursuant to the Civil Practice Act; and the court having considered the affidavit of the plaintiff for summary judgment, together with the supporting affidavits filed herein; and the court having also considered the affidavit of merits of the defendants filed in this cause; and the court having heard the arguments of counsel, and having considered said motion of the plaintiff for summary judgment, and being fully advised in the premises, the court Doth Find:

"That plaintiff's affidavit for summary judgment and the supporting and additional affidavits filed herein, are in



SONIA SWIRSKY, Administratrix of the  
Estate of MEYER S. SWIRSKY, Deceased,  
Appellee,

v.

MILK WAGON DRIVERS' UNION, LOCAL 723,  
INTERNATIONAL BROTHERHOOD OF TEAM-  
STERS, CHAUFFEURS, STABLEMEN AND  
HELPER OF AMERICA; ROBERT G. FITCHIE;  
JAMES G. KENNEDY; STEVE C. SUMNER;  
FRED C. DAHMS; F. RAY BRYANT; ALVIN F.  
RICHARDS; JOSEPH L. PATTERSON; HENRY  
WEBER; THOMAS HAGGERTY; PETER HOBAN  
and GUS MOLINE,

Appellants.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

MR. JUSTICE SCAMIAN DELIVERED THE OPINION OF THE COURT.

An amended complaint in the nature of a bill in chancery  
was filed by plaintiff. The trial court entered the following  
judgment order:

"This cause coming on to be heard upon the motion of  
the plaintiff, Sonia Swirsky, as Administratrix of the Estate  
of Meyer S. Swirsky, deceased, by Myron E. Wisch, her attorney,  
for summary judgment in favor of the plaintiff and against the  
defendants, Milk Wagon Drivers' Union, Local 723, International  
Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of  
America; Robert G. Fitchie; James G. Kennedy; Steve C. Sumner;  
Fred C. Dahms; F. Ray Bryant; Alvin F. Richards; and Joseph L.  
Patterson; and each of them, pursuant to the Civil Practice Act;  
and the court having considered the affidavit of the plaintiff  
for summary judgment, together with the supporting affidavits  
filed herein; and the court having also considered the affi-  
davit of merits of the defendants filed in this cause; and the  
court having heard the arguments of counsel, and having con-  
sidered said motion of the plaintiff for summary judgment,  
and being fully advised in the premises, the court doth find:  
"That plaintiff's affidavit for summary judgment and  
the supporting and additional affidavits filed herein, are in

due form and in accordance with the Civil Practice Act.

"The court doth further find that the defendants, and each of them, have no defense to the action.

"It is, therefore, Ordered, Adjudged and Decreed that the motion of the plaintiff for summary judgment be and the same is hereby granted; and

"It is further Ordered, Adjudged and Decreed that the plaintiff, Sonia Swirsky, as Administratrix of the Estate of Meyer S. Swirsky, deceased, have and recover from the defendants, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America; Robert G. Fitchie; James G. Kennedy; Steve C. Sumner; Fred C. Dahms; F. Ray Bryant; Alvin F. Richards; and Joseph L. Patterson; and each of them the sum of Two Thousand Seven Hundred Two and 70/100 Dollars, as in plaintiff's affidavit alleged, with interest thereon at the rate of five per cent per annum from the 10th day of April, A. D. 1940, until paid, together with costs, and that the plaintiff have execution therefor."

Defendants appeal from that order. The amount of the judgment, \$2,702.70, was made up as follows: \$1,296 for sick benefits, \$1,000 for death benefits, and \$406.70 for interest. Neither the amount of the sick benefits nor the amount of the interest is now questioned in this court. Defendants contend that \$100, instead of \$1,000, should be awarded for death benefits.

When the briefs in the instant case were filed in this court Fichter v. Milk Wagon Drivers' Union, 382 Ill. 91, had not been decided by the Supreme court, and defendants, in their brief, were urging points made by them in the Fichter case. Upon the oral argument, because of the decision in the Fichter case, all of the points urged were abandoned save one, viz: "Even under the by-laws in effect when Meyer Swirsky became a member of the



the form and in accordance with the Civil Practice Act.

"The court both further find that the defendants, and each of them, have no defense to the action.

"It is, therefore, Ordered, Adjudged and Decreed that the motion of the plaintiff for summary judgment be and the same is hereby granted; and

"It is further Ordered, Adjudged and Decreed that the plaintiff, Sonia Swirsky, as Administratrix of the Estate of Meyer S. Swirsky, deceased, have and recover from the defendants, Milk Wagon Drivers' Union, Local 753, International Brotherhood of Teamsters, Chauffeurs, Stevedores and Helpers of America; Robert G. Fitch; James G. Kennedy; Steve G. Sumner; Fred C. Daines; F. Ray Bryant; Alvin F. Richards; and Joseph L. Patterson; and each of them the sum of Two Thousand Seven Hundred Two and 70/100 Dollars, as in plaintiff's affidavit alleged, with interest thereon at the rate of five per cent per annum from the 10th day of April, A. D. 1940, until paid, together with costs, and that the plaintiff have execution therefor."

Defendants appeal from that order. The amount of the judgment, \$2,702.70, was made up as follows: \$1,296 for sick benefits, \$1,000 for death benefits, and \$406.70 for interest. Whether the amount of the sick benefits nor the amount of the interest is now questioned in this court. Defendants contend that \$100, instead of \$1,000, should be awarded for death benefits.

When the briefs in the instant case were filed in this court Richter v. Milk Wagon Drivers' Union, 382 Ill. 91, had not been decided by the Supreme court, and defendants, in their brief, were urging points made by them in the Richter case. Upon the oral argument, because of the decision in the Richter case, all of the points urged were abandoned save one, viz: "Even under the by-laws in effect when Meyer Swirsky became a member of the



Union in 1930 the maximum death benefit to which he was entitled was the sum of One Hundred Dollars," and that the trial court erred in allowing plaintiff \$1,000 for death benefits. The brief filed by defendants is a lengthy one, but the instant point was disposed of in a few lines.

The following facts are undisputed: That Meyer S. Swirsky was a member in good standing of the Laundry Drivers' Union from January 6, 1925, to the date of his transfer to the Milk Wagon Drivers' Union on April 17, 1930; that he was employed by the Western Dairy Company, Inc., as a milk wagon driver; that Swirsky was permanently disabled from August 25, 1930, until the day of his demise, January 17, 1937; that he was a member in good standing of the defendant union from April 17, 1930, to January 17, 1937. Under the decision in the Fichter case the 1922 by-laws of the union governed the plaintiff's rights. The provision in said by-laws that relates to death benefits reads as follows:

"The first three months after becoming a member, either by paying initiation, transfer card or returning on withdrawal card no benefit will be paid; thereafter the benefits will be, from three months to the end of six months, \$100.00; after six months to the end of twelve months, \$300.00; thereafter \$1000.00."

The affidavit of Sonia Swirsky, plaintiff, in support of the motion for summary judgment alleges that "there is due to the plaintiff the sum of One Thousand Dollars as death benefits." The counter-affidavit filed by defendants in opposition to plaintiff's motion for a summary judgment contains no denial of the said allegation in plaintiff's affidavit. Indeed, the sole point now raised by defendants was not referred to in their counter-affidavit, and it was clearly an afterthought. The argument made by defendants in their brief in support of

Union in 1930 the maximum death benefit to which he was entitled was the sum of One Hundred Dollars," and that the trial court erred in allowing plaintiff \$1,000 for death benefits. The brief filed by defendants is a lengthy one, but the instant point was disposed of in a few lines.

The following facts are undisputed: That Meyer S.

Swirsky was a member in good standing of the Laundry Drivers' Union from January 6, 1925, to the date of his transfer to the Milk Wagon Drivers' Union on April 17, 1930; that he was employed by the Western Dairy Company, Inc., as a milk wagon driver; that Swirsky was permanently disabled from August 25, 1930, until the day of his demise, January 17, 1937; that he was a member in good standing of the defendant union from April 17, 1930, to January 17, 1937. Under the decision in the Fichter case the 1925 by-laws of the union governed the plaintiff's rights. The provision in said by-laws that relates to death benefits reads

as follows:

"The first three months after becoming a member, either by paying initiation, transfer card or returning on withdrawal card no benefit will be paid; thereafter the benefits will be, from three months to the end of six months, \$100.00; after six months to the end of twelve months, \$300.00; thereafter

\$1000.00."

The affidavit of Sonia Swirsky, plaintiff, in support of the motion for summary judgment alleges that "there is due to the plaintiff the sum of One Thousand Dollars as death benefits." The counter-affidavit filed by defendants in opposition to plaintiff's motion for a summary judgment contains no denial of the said allegation in plaintiff's affidavit. Indeed, the sole point now raised by defendants was not referred to in their counter-affidavit, and it was clearly an afterthought. The argument made by defendants in their brief in support of



the instant point is short, and we will quote it in full:

"Assume for the sake of argument, the 1930 by-laws govern. [It is conceded that the 1922 by-laws were in force in 1930 and that there were no by-laws passed in 1930.] The plaintiff recognized in her original complaint that at the time of his death Swirsky had not been a member for more than one year. Plaintiff then asked for the sum of \$300 as a death benefit. Under the 1930 by-laws \$300 was the death benefit payable for the death of one who had been a member for a period of 6 to 12 months.

"This original interpretation by plaintiff as to the time when a person is a member of the union within the meaning of the death benefit by-laws is more than defendants' interpretation. It should at least be followed in this Court."

This flimsy argument is based solely upon the fact that the original complaint alleges that there was due plaintiff, in addition to the sick benefits, "a further sum aggregating Three Hundred Dollars for death benefits, due under the said By-Laws in force and effect at the time the said deceased became a member of said association." Defendants do not call attention to the fact that plaintiff, in her amended complaint, alleges the following: "That, in addition thereto [the sick benefits], there is due to the plaintiff the sum of One Thousand Dollars as death benefits, pursuant to the by-laws, rules and regulations of said voluntary association." Defendants, in their argument, ignore the fact that in plaintiff's affidavit for a summary judgment the provision in question in the 1922 by-laws is set up in full and that plaintiff alleges that there is due her by reason of said provision the sum of \$1,000 as death benefits, and defendants also ignore the fact that in their counter-affidavit this allegation is not denied nor questioned. Indeed, defendants in their argument do not contend that plaintiff was not, in fact,



the instant point is short, and we will quote it in full:  
"Assume for the sake of argument, the 1930 by-laws govern. [It is conceded that the 1922 by-laws were in force in 1930 and that there were no by-laws passed in 1930.] The plaintiff recognized in her original complaint that at the time of his death Swirsky had not been a member for more than one year. Plaintiff then asked for the sum of \$300 as a death benefit. Under the 1930 by-laws \$300 was the death benefit payable for the death of one who had been a member for a period of 6 to 12 months.  
"This original interpretation by plaintiff as to the time when a person is a member of the union within the meaning of the death benefit by-laws is more than defendants' interpretation. It should at least be followed in this Court."  
This flimsy argument is based solely upon the fact that the original complaint alleges that there was due plaintiff, in addition to the sick benefits, "a further sum aggregating Three Hundred Dollars for death benefits, due under the said By-laws in force and effect at the time the said deceased became a member of said association." Defendants do not call attention to the fact that plaintiff, in her amended complaint, alleges the following: "That, in addition thereto [the sick benefits], there is due to the plaintiff the sum of One Thousand Dollars as death benefits, pursuant to the by-laws, rules and regulations of said voluntary association." Defendants, in their argument, ignore the fact that in plaintiff's affidavit for a summary judgment the provision in question in the 1922 by-laws is set up in full and that plaintiff alleges that there is due her by reason of said provision the sum of \$1,000 as death benefits, and defendants also ignore the fact that in their counter-affidavit this allegation is not denied nor questioned. Indeed, defendants in their argument do not contend that plaintiff was not, in fact,

entitled to the \$1,000 as death benefits, but the argument amounts to this, that because in the original complaint plaintiff misinterpreted her rights under the provision in question she should be held to that misinterpretation regardless of the justice of her claim. It is no compliment to this court that defendants' counsel should have seen fit to make such an argument. As shown in their counter-affidavit to plaintiff's affidavit in support of her motion for summary judgment and by their brief filed in this court, the attitude of defendants in the trial court was that plaintiff was not entitled to the \$1,000 death benefits under the 1922 by-laws because Swirsky was bound by the 1936 by-laws and under said by-laws was not entitled to any death benefit. The Supreme court, in the Fichter case, decided adversely to the defendants all of the real points that they raised in their brief in this court in the instant proceeding, and when the Fichter case was decided the instant appeal should have been dismissed.

The judgment order of the Superior court of Cook county should be and it is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

entitled to the \$1,000 as death benefits, but the argument amounts to this, that because in the original complaint plaintiff misinterpreted her rights under the provision in question she should be held to that misinterpretation regardless of the justice of her claim. It is no complaint to this court that defendants' counsel should have seen fit to make such an argu-

ment. As shown in their counter-affidavit to plaintiff's affidavit in support of her motion for summary judgment and by their brief filed in this court, the attitude of defendants in the trial court was that plaintiff was not entitled to the \$1,000 death benefits under the 1923 by-laws because Saturday was found by the 1936 by-laws and under said by-laws was not entitled to any death benefit. The Supreme court, in the Fichter case, decided adversely to the defendants all of the real points that they raised in their brief in this court in the instant proceeding, and when the Fichter case was decided the instant appeal should have been dismissed.

The judgment order of the superior court of Cook county should be and it is affirmed.

JUDGMENT ORDER AFFIRMED.

Friend, J. J. and Sullivan, J. J. concur.



42429

FRANCES BAUMGARDNER,  
Individually,

Appellee,

v.

PAUL BOYER,

Appellant.

320 I.A. 438

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Frances Baumgardner, individually, sued defendant, Paul Boyer, to recover damages for personal injuries to herself, and also sued him as administratrix of the estate of Orville Baumgardner, deceased, to recover damages for the death of her husband. The two cases were tried together and the jury returned a verdict for plaintiff, individually, in the sum of \$5,000 and also returned a verdict of not guilty in the death case. Defendant did not ask for a new trial in the case where the verdict was against him but entered a motion for judgment non obstante veredicto, which motion was denied, and judgment was entered upon the verdict. He appeals from the action of the trial court in denying his motion for judgment non obstante veredicto. The trial court, upon motion of plaintiff, as administratrix, granted her a new trial in the death case. Defendant then filed in this court a petition for leave to appeal from that order. On January 12, 1943, we denied defendant's petition.

Count I of the complaint relates to the claim of plaintiff, individually, and reads as follows:

"Count I

"Now comes the plaintiff FRANCES BAUMGARDNER, individually, \* \* \* and complains of the defendant PAUL BOYER, and for her cause of action says:

"1. That on or about to-wit the 16th day of June, 1940, the plaintiff Frances Baumgardner, individually, was riding in an automobile which was being operated in to-wit a westerly

FRANCIS BAUGARDNER, individually, Appellee,  
v.  
PAUL BOYER, Appellant.

MR. JUSTICE ACALIN DELIVERED THE OPINION OF THE COURT.

Francis Baugardner, individually, said defendant, Paul Boyer, to recover damages for personal injuries to herself, and also said him as administratrix of the estate of Gaville Baugardner, deceased, to recover damages for the death of her husband. The two cases were tried together and the jury returned a verdict for plaintiff, individually, in the sum of \$5,000 and also returned a verdict of not guilty in the death case. Defendant did not ask for a new trial in the case where the verdict was against him but entered a motion for judgment non obstante verdicto, which motion was denied, and judgment was entered upon the verdict. He appeals from the action of the trial court in denying his motion for judgment non obstante verdicto. The trial court, upon motion of plaintiff, as administratrix, granted her a new trial in the death case. Defendant then filed in this court a petition for leave to appeal from that order. On January 12, 1943, we denied defendant's petition. Count I of the complaint relates to the claim of plaintiff, individually, and reads as follows:

"Count I

"Now comes the plaintiff FRANCIS BAUGARDNER, individually, \* \* \* and complains of the defendant PAUL BOYER, and for her cause

of action says:

"1. That on or about the 15th day of June, 1942, the plaintiff Francis Baugardner, individually, was riding in an automobile which was being operated in to-wit: westerly

direction along and upon to-wit 55th Street, a public highway located in the County of Cook and State of Illinois, and was at all times in the exercise of all due care and caution for her own safety.

"2. That the defendant maintained and operated a vehicle in a southerly direction along and upon to-wit Willow Springs Road, at or near where the same intersects with 55th Street in the County and State aforesaid.

"3. That the defendant misconducted himself in one or more of the following ways:

"a. Operated his vehicle in a negligent manner;

"b. Negligently operated his vehicle at an excessive rate of speed in violation of the statute of the State of Illinois in such case made and provided;

"c. Negligently disregarded traffic signals;

"d. Negligently failed to give any warning signal to the plaintiff by blowing his horn;

"e. Failed to stop his vehicle when danger to plaintiff was imminent.

"f. Drove said vehicle in a willful and wanton manner with a conscious indifference to the consequences.

"4. That by virtue of one or more of the above mentioned ways, the defendant's vehicle was caused to and did collide with the automobile in which the plaintiff was riding.

"5. That by means of and in consequence of the direct negligence of the defendant, the plaintiff FRANCES BAUMGARDNER, individually, became greatly injured both internally and externally and divers parts of her body became therefrom sick, sore, lame and disabled \* \* \*.

"TO THE DAMAGE OF THE PLAINTIFF FRANCES BAUMGARDNER individually in the sum of TWENTY THOUSAND DOLLARS."



direction along and upon to-1st 5th Street, a public highway located in the County of Cook and State of Illinois, and was at all times in the exercise of all due care and caution for her own safety.

"2. That the defendant maintained and operated a vehicle in a southerly direction along and upon to-1st 5th Street in Road, at or near where the same intersects with 5th Street in the County and State aforesaid.

"3. That the defendant misconnected himself in one or more of the following ways:

- "a. Operated his vehicle in a negligent manner;
- "b. Negligently operated his vehicle at an excessive rate of speed in violation of the statute of the State of Illinois in such case made and provided;

- "c. Negligently disregarded traffic signals;
- "d. Negligently failed to give any warning signal to the plaintiff by blowing his horn;

"e. Failed to stop his vehicle when known to plaintiff was imminent.

"f. Drove said vehicle in a willful and wanton manner with a conscious indifference to the consequences.

"4. That by virtue of one or more of the above mentioned ways, the defendant's vehicle was caused to and did collide with the automobile in which the plaintiff was riding.

"5. That by means of and in consequence of the direct negligence of the defendant, the plaintiff FRANCES BAUGHMAN, individually, became greatly injured both internally and externally and divers parts of her body became lacerated, sore, lame and disabled \* \* \*

"TO THE DAMAGE OF THE PLAINTIFF FRANCES BAUGHMAN, individually in the sum of TWENTY THOUSAND DOLLARS."

The following amendment to Count I was allowed:

"Paragraph 3

"g. That the said defendant then and there wilfully and wantonly drove his said automobile into the intersection disregarding the stop sign protecting said intersection.

"h. That the said defendant then and there wilfully and wantonly, and with a conscious indifference to the consequences, drove his said automobile at a high and dangerous rate of speed into the said intersection without stopping and without regard to the stop signs then and there protecting the said intersection."

Defendant, in his answer, denies that he was guilty of wilful and wanton misconduct as charged, denies that he was guilty of negligence, and alleges that he was in the exercise of due care at the time and place in question, that plaintiff was not in the exercise of due care and caution for her own safety, and that she "was guilty of willful and wanton misconduct which proximately caused or contributed to bringing about the occurrence complained of."

Defendant's sole contention is that "the trial court's denial of defendant's motion for judgment notwithstanding the verdict was reversible error." Defendant admits that "the rule applied to a motion for judgment notwithstanding the verdict is the same as the rule applied to a motion to direct a verdict."

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence

The following amendment to Count I was allowed:

"Paragraph 1

"g. That the said defendant then and there wilfully and wantonly drove his said automobile into the intersection here-  
garding the stop sign protecting said intersection.  
"h. That the said defendant then and there wilfully and wantonly, and with a conscious indifference to the consequences, drove his said automobile at a high and dangerous rate of speed into the said intersection without stopping and without regard to the stop signs then and there protecting the said intersection."

Defendant, in his answer, denies that he was guilty of willful and wanton misconduct as charged, denies that he was guilty of negligence, and alleges that he was in the exercise of due care at the time and place in question; that plaintiff was not in the exercise of due care and caution for her own safety, and that she "was guilty of willful and wanton misconduct which proximately caused or contributed to bringing about the occurrence complained of."

Defendant's sole contention is that "the trial court's denial of defendant's motion for judgment notwithstanding the verdict was reversible error." Defendant admits that "the rule applied to a motion for judgment notwithstanding the verdict is the same as the rule applied to a motion to direct a verdict."

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence



fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296-7.)" (Mahan v. Richardson, 284 Ill. App. 493. See, also, Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597.)

While defendant's counsel concede that we are governed by the foregoing principles of law in passing upon defendant's contention, they repeatedly disregard the principles in their argument, they attack the credibility of witnesses for plaintiff, argue as to the weight that should be attached to certain testimony, and cite as facts for us to consider in passing upon their contention evidence adduced by defendant in rebuttal of evidence introduced by plaintiff.

We find evidence fairly tending to prove the following facts: The accident occurred on the morning of June 16, 1940, at the intersection of 55th street and Willow Springs road, which intersection lies in a rural district of Cook county. It was a bright, clear morning; the sun was shining and the visibility was good; the pavements dry. 55th street runs east and west. It is a State highway, a through route. Defendant, in his brief, calls 55th street "a preferred highway." 55th street and Willow Springs road each has a two-lane concrete pavement twenty feet in width. The car in which plaintiff was riding was owned and driven by Orville Baumgardner, her husband, and it was proceeding on 55th street in a westerly direction. The Baumgardners were on their way to Downers Grove, located a few miles from the intersection. Defendant was driving his automobile south on Willow Springs road. There was nothing to obstruct his view of the intersection or of 55th street to the east. Defendant started from Naperville, Illinois, and was on his way to Fremont, Ohio. He testified that once a year he

fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 252 Ill. 414; Yess v. Reynolds, 252 Ill. 188; Levy v. Ryan, 273 Ill. 491; Quinter v. Truitt, 273 Ill. 293, 296-7. "Yess v. Reynolds, 284 Ill. app. 493. See, also, Holover v. Curtis Candy Co., 293 Ill. app. 286, 297. While defendant's counsel contends that we are governed by the foregoing principles of law in passing upon defendant's contention, they repeatedly disregard the principles in their argument, they attack the credibility of witnesses for plaintiff, argue as to the weight that should be attached to certain testimony, and cite as facts for us to consider in passing upon their contention evidence adduced by defendant, in rebuttal of evidence introduced by plaintiff.

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passed over the place in question on his way to Ohio. On Willow Springs road, as one approaches 55th street from the north, there are three warning signs that are painted in yellow and black colors. The first sign, two by three feet in size, is located at a point 636 feet north of the intersection and bears the words, "CROSS ROAD 55th St." 450 feet north of the intersection there is a second sign, about two feet square, that bears the words, "STOP AHEAD." The third sign is located sixty-three feet north of the center of the intersection and bears the words, "STOP State Route." Each sign is about four feet from the ground. There was nothing to obscure a view of the signs. Defendant testified that there was no traffic on Willow Springs road; "no traffic ahead of me or anything like that, nothing to obscure my view of these signs." His car struck the rear end of plaintiff's car on the right side and "the rear end was torn partly away from the car;" "the back of the car was demolished." Defendant's car was damaged at the front. The sound of the crash was heard half a mile away from the intersection. In the Baumgardner car were Baumgardner; plaintiff, his wife; Mr. Ehl, and Mrs. Altman. In defendant's car were defendant, his wife, and a small child. The force of the impact appears to have instantly killed Mr. Baumgardner, whose head "was cracked open." The three other occupants of the Baumgardner car were rendered unconscious by the impact. Plaintiff remained unconscious for several days. She suffered a fracture of the neck and a colles fracture of the right radius. Mrs. Altman was taken to a hospital and at the time of the trial was still under a doctor's care and unable to testify in the cause. Clarence Ehl suffered a concussion of the brain and his "nose was broken." He testified that the last thing that happened before the accident that he could remember was passing a gas station on 55th street. Plaintiff, Mr. Altman and Clarence Ehl "were strewn along the south ditch on 55th street, west of Willow Springs road," "about 25 to 30



[illegible]

feet apart." According to one witness, the Baumgardner car, after the impact, was in a cloud of dust and was turning and rolling in the air fifteen to twenty feet above the ground; it then hit the ground and turned over in the air again, and again hit the ground, and finally came to a stop on the south side of 55th street, 225 feet from the intersection. It was then lying on its side, off the road, and "the motor was still running." Baumgardner was lying on the pavement about eight feet in front of the car. After the accident defendant's car was standing upright in the ditch on the west side of Willow Springs road and south of 55th street. None of the occupants of defendant's car appears to have sustained any serious injuries. Holgar John Peterson, a police officer of the village of Western Springs, received a call that there had been an accident at the intersection in question and at once drove to the place and made an investigation of the accident. Officer Karstens was with him. While they were making the investigation Officer Peterson had a talk with defendant. Officer Peterson testified: "I spoke to Mr. Boyer at the scene of the accident when I returned from the hospital; I got the usual information, the license number and driver's license, name and address, and I said: 'What did you do - run through the sign?' He said: 'Yes.' I said 'Didn't you see the signs up ahead?' And he said no, he didn't. \* \* \*

Mr. Finn [attorney for plaintiff]: Q. Did you ask him with reference to the speed of the automobile? The Witness: I asked him how fast he was going and he said between forty and forty-five miles an hour. He said he had not seen the other car before the collision occurred." Frank Chaloupka, a highway deputy sheriff of Cook county, called to the scene of the accident, testified that he asked defendant if he had seen the signs and that defendant answered that he did not notice any signs. Upon the trial defendant testified that he saw the first sign but



[illegible]



"didn't see the second sign at all;" that he saw the third sign when he was "about ten feet from abreast of it." During the examination of defendant by his counsel the following occurred: Mr. Sears: Q. Now, this other car, when you first saw it did you have any idea how far it was from this crossroads sign on 55th Street? A. No, I haven't, sir. As I stated before, I saw the top of the car and the rear end of this sign at the same time. Whether or not they were parallel I don't know." The evidence shows that the "CROSS ROAD 55th St." sign is 636 feet north of the intersection. Defendant further testified that he could not tell how far east of Willow Springs road the Baumgardner car was at the time he first saw it, nor did he know how fast that car was going at that time; that after the accident he saw marks of his tires on the pavement, which showed that his "brakes began to grab about eight or nine feet from the collision;" that he did not blow his horn as he approached 55th street.

From the force of the impact and the consequences that followed it the jury might reasonably have inferred that defendant, as he approached 55th street and proceeded into the intersection, was driving his car at a high and dangerous rate of speed. The jury would also have been warranted in finding that the Baumgardner car entered the intersection ahead of defendant's car. The Baumgardner car had almost passed through the intersection when defendant's car struck it in the rear.

Defendant makes but two points in support of his contention that the trial court committed reversible error in denying his motion for judgment non obstante veredicto: (1) "There is no evidence of wilful and wanton misconduct on the part of the defendant," and (2) "There is no evidence of due care on the part of the plaintiff but on the contrary the record shows her to have been guilty of contributory negligence as a matter

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From the force of the impact and the consequences that followed it the jury might reasonably have inferred that defendant, as he approached 55th street and proceeded into the intersection, was driving his car at a high and dangerous rate of speed. The jury would also have been warranted in finding that the Baumgardner car entered the intersection ahead of defendant's car. The Baumgardner car had almost passed through the intersection when defendant's car struck it in the rear.

Defendant makes but two points in support of his contention that the trial court committed reversible error in denying his motion for judgment non obstante veritate: (1) "There is no evidence of willful and wanton misconduct on the part of the defendant," and (2) "There is no evidence of due care on the part of the plaintiff but on the contrary the record shows her to have been fully of competent legal mind as a motorist."



of law." Therefore, we have a case where the defendant does not contend that he was not guilty of negligence at the time and place in question. Indeed, it is conceded in his brief that his failure to stop at the stop sign at the Willow Springs road and 55th street intersection may constitute negligence. Defendant's counsel in arguing contention (1) ignore the important fact that that contention is urged in support of their main contention that the trial court erred in denying the motion for judgment non obstante veredicto. They concede, as they must, that under the law of this State defendant was required to come to a full stop as he reached the intersection and give the right of way to vehicles upon 55th street, a State highway, but they argue that defendant's failure to stop at the stop sign in and of itself does not constitute wilful negligence.

As bearing upon the statements made by defendant at the scene of the accident to Officer Peterson and Frank Chaloupka, that he did not see the signs, it is the established law of this State that one will not be allowed to state that he did not see cautionary and stop signs when if he had properly exercised his faculty of sight he would have seen the signs. (Greenwald v. B. & O. R. R. Co., 332 Ill. 627.)

"\* \* \* Whether the negligent conduct of a defendant which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury. (Lake Shore and Michigan Southern Railway Co. v. Bodemer, supra [139 Ill. 596].) An intentional disregard of a known duty necessary to the safety of the person or property of another and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, make



of law." Therefore, we have a case where the defendant was not content that he was not guilty of negligence at the time and place in question. Indeed, it is conceded in his brief that his failure to stop at the stop sign at the Willow Springs road and 55th street intersection was contributory negligence. Defendant's counsel in arguing contention (1) is now the important fact that that contention is urged in support of their main contention that the trial court erred in denying the motion for judgment non obstante veredicto. They contend, as they must, that under the law of this State defendant was required to come to a full stop as he reached the intersection and give the right of way to vehicles upon 55th street, a State highway, but they argue that defendant's failure to stop at the stop sign in and of itself does not constitute willful negligence.

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296].) An intentional disregard of a known duty necessary to the safety of the person or property of another and an entire absence of care for the life, person or property of others, such as prohibits a conscious indifference to consequences, which

a case of constructive or legal willfulness such as charges the person whose duty it was to exercise care with the consequences of a willful injury. (1 Thompson on Negligence, secs. 20, 22.)" (Walldren Express Co. v. Krug, 291 Ill. 472, 476, 477.)

"\* \* \* It is difficult, if not impossible, to lay down a rule of general application by which we may determine what degree of negligence the law considers equivalent to a willful or wanton act. Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of willfulness or wantonness." (Bernier v. Illinois Central R. Co., 296 Ill. 464, 470, 471.)

As bearing upon contention (1) there is evidence to show the following: Defendant was familiar with the locus in quo and he knew that 55th street was a State highway. As he approached the intersection there was nothing to obscure his view of the signs at the intersection and when he was some distance from the intersection he saw the Baumgardner car also approaching the intersection, and counsel for defendant admit, as they must, that under a statute of this State the Baumgardner car had the right of way at the intersection and that defendant was required to stop his car as he approached the State highway. Defendant disregarded three warning signs and failed to stop at the intersection, and without giving any warning of his intention to enter the intersection drove into it at a high rate of speed and his car struck the rear end of the Baumgardner car on its right side with such terrific force that it produced the terrible consequences that followed the impact. We are satisfied that there was sufficient evidence to warrant the jury in finding that defendant's actions, just prior to and at the time of the accident, constituted wilful and wanton conduct and we feel impelled to say that we are in accord with the finding.



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As bearing upon contention (1) there is evidence to show

the following: Defendant was familiar with the facts in one and he knew that 25th street was a State highway. As he approached the intersection there was nothing to obscure his view of the signs at the intersection and when he was some distance from the intersection he saw the Baumgardner car also approaching the intersection and counsel for defendant admit, as they must, that under a statute of this State the Baumgardner car had the right of way at the intersection and that defendant was required to stop his car as he approached the State highway. Defendant disregarded these warning signs and failed to stop at the intersection, and without giving any warning of his intention to enter the intersection drove into it at a high rate of speed and his car struck the rear end of the Baumgardner car on its right side with such terrific force that it produced the terrible consequences that followed the impact. We are satisfied that there was sufficient evidence to warrant the jury in finding that defendant's actions, just prior to and at the time of the accident, constituted willful and wanton conduct and we feel compelled to say that we are in accord with the findings.



As to defendant's second point, that "there is no evidence of due care on the part of the plaintiff but on the contrary the record shows her to have been guilty of contributory negligence as a matter of law." The defense of contributory negligence does not apply where the injuries are wilfully inflicted.

(Walldren Express Co. v. Krug, 291 Ill. 472, supra; Heidenreich v. Bremner, 260 Ill. 439; I. C. R. R. Co. v. Leiner, 202 Ill. 624; Wabash R. R. Co. v. Speer, 156 Ill. 244; L. S. & M. S. Ry. Co. v. Bodemer, 139 Ill. 596; Rest v. Noble & Co., 316 Ill. 357, 374.)

But even if it could be assumed that defendant was not guilty of wilful and wanton conduct and that his conduct amounted to no more than ordinary negligence, as his counsel insist, and that defendant therefore has the right to raise his second point, we would hold that there was sufficient evidence to warrant the jury in finding that plaintiff was not guilty of contributory negligence. Even if it could be assumed that plaintiff's husband, the driver of the car, were guilty of negligence, his negligence cannot be imputed to plaintiff, a passenger in the car. She can be charged only with her own negligence. Defendant contends that the number of passengers in the car obscured the view of the driver and interfered with his control of the car. Plaintiff and Clarence Ehl, the only passengers in the car that were able to testify, both testified that the number of persons in the car in no way interfered with the vision of the driver of the car or his opportunity to see, and did not interfere with or hinder the management, control or operation of the car. Plaintiff testified that she saw defendant's car before it entered the intersection, and Baumgardner must have seen it as it entered the intersection because, just before the impact, he threw his arm in front of plaintiff to protect her. In an effort to avoid the effect of the testimony of plaintiff and Ehl defendant's

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counsel argue that it is difficult to believe their testimony "that the driver's view to the right was not obstructed or that his control of the car was not interfered with." It is sufficient to say in answer to this argument that it is not our province in deciding the instant contention of defendant to pass upon the credibility of witnesses or the weight that should be attached to their testimony.

Defendant argues that plaintiff was negligent in failing to warn her husband of an approaching danger.

In Thomas v. Buchanan, 357 Ill. 270, the defendant was not charged in the complaint with wilful or wanton conduct. The collision in that case happened in Niles Center, in Cook county, at the intersection of Crawford avenue, which runs north and south, and Church street, which runs east and west. Church street is a State highway or through street. The automobile in which the deceased was riding at the time of the accident was being driven east on Church street by Earl Anderson, its owner, and the automobile driven by the defendant was moving north on Crawford avenue. On Crawford avenue approaching Church street there were the same kind of warning signs as were present on Willow Springs road in the instant case. In the Thomas case the court said (pp. 277, 278):

"Anderson was familiar with Crawford avenue and knew that the one caution sign and the two stop signs were there, and while under ordinary conditions he had the right of way over the automobile of the defendant, yet that did not of itself relieve him or the deceased from the exercise of due care and caution on their respective parts. However, Anderson and the deceased had the right to assume that the driver of the automobile approaching on Crawford avenue would not negligently fail to reduce the speed of his automobile as he approached such street intersection [Church street] and would at least



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have his car under control so as to give preference of the right of way to Anderson, if necessary for the safety of the occupants of the car approaching the street intersection from the west.

Dukeman v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 237 Ill. 104; Soucie v. Payne, 299 id. 552; Schlauder v. Chicago and Southern Traction Co., 253 id. 154; Chicago City Railway Co. v. Fennimore, 199 id. 9; Chicago, Burlington and Quincy Railroad Co. v. Gunderson, 174 id. 495. \* \* \* The question of due care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased. We are not able to say, under the facts proved, that the conduct of Anderson at and immediately prior to the collision in question was such as to have warranted the trial judge in deciding, as a matter of law, that either Anderson or Thomas was guilty of contributory negligence."

In the Thomas case the Supreme court also held (p. 276) that there can be no doubt but that the defendant was guilty of negligence in failing to stop his car at Church street and that the law will not permit him to say that he did not see the signs when if he had properly exercised his faculty of sight he would have seen such signs. It is undoubtedly the law that it is the duty of a passenger in an automobile, where he has an opportunity of learning of approaching danger and to avoid it, to warn the driver of the vehicle of such danger, and if he were negligent in that regard and such negligence contributed or proximately contributed to the injury, such negligence would prevent his recovery. But before a passenger in an automobile can be charged with contributory negligence in failing to warn the driver of danger it must appear from the evidence that the passenger had



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Dickman v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co., 237 Ill. 104; Gorsie v. Evans, 297 Id. 522; Belknap v. Chicago and Southern Traction Co., 253 Id. 154; Chicago City Railway Co. v. Tennessee, 199 Id. 9; Chicago, Burlington and Quincy Railroad Co. v. Gundersen, 174 Id. 49. \* \* \* The question of due care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased. We are not able to say, under the facts proved, that the conduct of Anderson at and immediately prior to the collision in question was such as to have warranted the trial judge in deciding, as a matter of law, that either Anderson or Thomas was guilty of contributory negligence."

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time and opportunity to become conscious of the danger by the exercise of ordinary care, and a reasonable opportunity to perform his duty in that regard. Plaintiff testified that she saw defendant's car about 75 feet or 100 feet back of the intersection; that the next thing she can remember is that her husband threw his arm in front of her to protect her, and the next thing that she can remember "is coming to in the hospital." The jury might well have found that the conduct of defendant in failing to stop at the intersection and entering it at a high and dangerous rate of speed could not have been foreseen and guarded against by the exercise of reasonable care on the part of Baumgardner or plaintiff, and that the collision was due solely to the misconduct of defendant. Under the facts that we are bound to assume in passing upon this appeal, it is certain that we would not be justified in holding that there was not sufficient evidence to warrant the jury in finding that plaintiff was not guilty of contributory negligence.

Illinois cases where passengers in an automobile have been held to be guilty of contributory negligence differ materially from the instant case upon the facts.

The judgment of the Superior court of Cook county should be and it is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

time and opportunity to become conscious of the danger by the exercise of ordinary care, and a reasonable opportunity to protect his duty in that regard. Plaintiff testified that she saw defendant's car about 75 feet or 100 feet back of the intersection; that the next thing she can remember is that her husband threw his arm in front of her to protect her, and the next thing that she can remember "is coming to in the hospital." The jury might well have found that the conduct of defendant in failing to stop at the intersection and entering it at a high and dangerous rate of speed could not have been foreseen and guarded against by the exercise of reasonable care on the part of Baumgardner or plaintiff, and that the collision was due solely to the misconduct of defendant. Under the facts that we are bound to assume in passing upon this appeal, it is certain that we could not be justified in holding that there was not sufficient evidence to warrant the jury in finding that plaintiff was not guilty of contributory negligence.

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JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

42460

320 I.A. 439

IN RE ESTATE OF V. W. McCORMACK,  
also known as VINCENT W. McCORMACK,  
Deceased.

BETH WEBER,  
Appellant,

v.

CARL KRESL, as Executor of the  
Estate of V. W. McCormack,  
Deceased,  
Appellee.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On May 21, 1941, plaintiff filed in the Probate court of Cook county a verified claim for \$1,525 against the estate of V. W. McCormack, deceased, in which she alleges that "Claimant loaned V. W. McCormack \$1000.00 on December 31, 1930; V. W. McCormack failed to pay any part of said sum until January 13, 1939, on which day he paid claimant \$50.00 to apply on said loan and on said date promised to pay claimant the balance due within six months, but failed to do so. There is due claimant \$950.00 on principal and \$575.00 in interest; or a total due claimant of \$1525.00." Claimant will be hereinafter referred to as plaintiff. The judge of the Probate court, after a hearing, entered an order disallowing the claim. Plaintiff appealed from that order to the Circuit court of Cook county and there demanded a trial by jury, which was had. At the conclusion of plaintiff's evidence the trial court, upon motion of defendant, directed the jury to find a verdict for defendant. Plaintiff appeals from a judgment entered upon the verdict.

In the Circuit court, defendant was ruled to file an answer to the claim. This answer set up:

- "(1) That claimant did not loan Vincent W. McCormack \$1000.00 on December 31, 1930 or on any other date; or
- "(2) That in the event claimant loaned Vincent W.



IN RE ESTATE OF V. W. MCCORMACK,  
also known as VINCENT W. MCCOR-  
MICK, Deceased.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

BETH WEBER,  
Appellant,

v.

CARL KRESSEL, as Executor of the  
Estate of V. W. McCormack,  
Deceased,  
Appellee.

MR. JUSTICE SCAMMAM DELIVERED THE OPINION OF THE COURT.

On May 21, 1941, plaintiff filed in the Probate court of Cook county a verified claim for \$1,252 against the estate of V. W. McCormack, deceased, in which she alleges that "Claimant loaned V. W. McCormack \$1000.00 on December 31, 1930; V. W. McCormack failed to pay any part of said sum until January 13, 1932, on which day he paid claimant \$20.00 to apply on said loan and on said date promised to pay claimant the balance due within six months, but failed to do so. There is due claimant \$980.00 on principal and \$72.00 in interest; or a total due claimant of \$1052.00." Claimant will be hereinafter referred to as plaintiff. The Judge of the Probate court, after a hearing, entered an order disallowing the claim. Plaintiff appealed from that order to the Circuit court of Cook county and there demanded a trial by jury, which was had. At the conclusion of plaintiff's evidence the trial court, upon motion of defendant, directed the jury to find a verdict for defendant. Plaintiff appeals from a judgment entered upon the verdict.

In the Circuit court, defendant was ruled to file an answer to the claim. This answer set up:

"(1) That claimant did not loan Vincent W. McCormack

\$1000.00 on December 31, 1930 or on any other date; or

"(2) That in the event claimant loaned Vincent W.

McCormack the sum of \$1000.00, said loan was made as consideration for the said Vincent W. McCormack's not contesting a divorce suit instituted against him by the said Beth Weber in which event, said loan was an illegal transaction;

"(3) And for a further defense, the undersigned alleges that the cause of action stated in the claim of Beth Weber did not accrue to Beth Weber at any time within five years next before the commencement of this action."

At the time the alleged loan was made plaintiff and decedent were married but living separate and apart. A divorce proceeding was then pending and a decree of divorce was entered therein several weeks after the date of the alleged loan. No note was given to evidence the loan, nor was there any written evidence introduced tending to prove the alleged indebtedness, and the claim of plaintiff rests entirely upon alleged admissions of the decedent, McCormack.

Plaintiff contends (1) that she made out a prima facie case as to the loan, and (2) that she introduced evidence sufficient to take the case out of the five year Statute of Limitations.

Contention (1) is clearly a meritorious one. In answer to the contention defendant cites the wholesome rule of law that in a case of this kind the alleged admissions of the deceased must be carefully scrutinized, and argues that "it has long been the policy of the State of Illinois to protect the estates of decedents from attacks by unscrupulous people who would not be above committing perjury to gain a few dollars;" that this is a case where the foregoing rule should be applied; that the decedent lived in Chicago ten years from the date of the making of the alleged loan until his death; that "the claimant took no steps to secure from the decedent any written statement of an obligation; took no steps when she knew where he was working to file suit so that she might garnishee his wages; took no steps to protect herself as long as



McCormack the sum of \$1000.00, said loan was made as consideration for the said Vincent W. McCormack's not contesting a divorce suit instituted against him by the said Beth Weber in which event, said loan was an illegal transaction;

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that the cause of action stated in the claim of Beth Weber did not accrue to Beth Weber at any time within five years next before the commencement of this action."

At the time the alleged loan was made plaintiff and decedent were married but living separate and apart. A divorce proceeding was then pending and a decree of divorce was entered therein several weeks after the date of the alleged loan. No note was given to evidence the loan, nor was there any written evidence introduced tending to prove the alleged indebtedness, and the claim of plaintiff rests entirely upon alleged admissions of the decedent, McCormack.

Plaintiff contends (1) that she made out a prima facie case as to the loan, and (2) that she introduced evidence sufficient to take the case out of the five year Statute of Limitations. Contention (1) is clearly a meritless one. In answer to the contention defendant cites the wholesome rule of law that in a case of this kind the alleged admissions of the deceased must be carefully scrutinized, and argues that "it has long been the policy of the State of Illinois to protect the estates of decedents from attacks by unscrupulous people who would not be above committing perjury to gain a few dollars;" that this is a case where the foregoing rule should be applied; that the decedent lived in Chicago ten years from the date of the making of the alleged loan until his death; that "the claimant took no steps to secure from the decedent any written statement of an obligation; took no steps when she knew where he was working to file suit so that she might garnish his wages; took no steps to protect herself as long as



McCormack was present to deny the loan and to deny the payment or to state that it was a gift for 'old times sake.' It should be noted that on the two occasions when the plaintiff was required to have a witness present to testify to a conversation, because she herself was disqualified under the Evidence Act, the witness was allegedly present but these witnesses came to Court knowing full well that they would not be required to face the man whose admissions they claimed to be repeating. The estate, as far as these conversations are concerned, was helpless. They could have been anywhere, any place, any time. The fact that the claimant saw fit not to prosecute her claim until her alleged debtor was no longer present to protect himself and his property is outstandingly significant and when taken together with the type of evidence which has been introduced in support of this claim solidifies the reaction that one must acquire from a reading of this record that there never was a loan and that the dead man never made any statement or performed any act from which the protection of the Statute of Limitations could be destroyed. We are dealing here with a claimant who is not an ordinary housewife or a person inexperienced in business matters. The record is full of testimony that she operated business establishments; she knew what she would face if she sued McCormack while he was alive and thus, like a ghoul, she waited for his demise in the expectation that his estate would be defenseless to her prosecution of this claim." In the Probate court the case was tried by the court and the instant argument of defendant would have been a proper one to address to the judge of that court, as he had the right to pass upon the credibility of the witnesses and to determine the weight, if any, that should be attached to their testimony, and if the instant appeal were from the judgment of that court the argument of counsel for plaintiff would be a proper one to make to this court. But, in the Circuit court plaintiff demanded a trial by jury, and

McCormack was present to deny the loan and to deny the payment or to state that it was a gift for "old times sake." It should be noted that on the two occasions when the plaintiff was required to have a witness present to testify to a conversation, because she herself was disqualified under the Evidence Act, the witness was allegedly present but these witnesses came to Court knowing full well that they would not be required to face the man whose statements they claimed to be repeating. The estate, as far as these conversations are concerned, was helpless. They could have been anywhere, any place, any time. The fact that the claimant saw fit not to prosecute her claim until her alleged debtor was no longer present to protect himself and his property is outstandingly significant and when taken together with the type of evidence which has been introduced in support of this claim solidifies the reaction that one must acquire from a reading of this record that there never was a loan and that the dead man never made any statement or performed any act from which the protection of the Statute of Limitations could be destroyed. We are dealing here with a claimant who is not an ordinary housewife or a person inexperienced in business matters. The record is full of testimony that she operated business establishments; she knew what she would face if she sued McCormack while he was alive and thus, like a ghost, she waited for his demise in the expectation that his estate would be defenseless to her prosecution of this claim." In the Probate Court the case was tried by the court and the instant argument of defendant would have been a proper one to address to the Judge of that court, as he had the right to pass upon the credibility of the witnesses and to determine the weight, if any, that should be attached to their testimony, and if the instant appeal were from the judgment of that court the argument of counsel for plaintiff would be a proper one to make to this court. But



the question presented to us is, Was the action of the trial court in directing a verdict for defendant justified under the evidence and the law?

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296-7.)" (Mahan v. Richardson, 284 Ill. App. 493. See, also, Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597.)

Had the trial court denied the motion to direct a verdict and had the jury returned a verdict for plaintiff, and the latter were appealing from an order of the trial court granting defendant a new trial, a different question would be presented to us.

As to point (2): Plaintiff contends that the evidence established a new promise to repay the debt and a payment on account thereof, and therefore the case was taken out of the five year Statute of Limitations. Defendant contends that the evidence of plaintiff is insufficient to remove the bar of the statute and that it failed to show that the decedent made a payment on the obligation with an express or implied promise to pay the balance and under circumstances clearly identifying the debt. Plaintiff relies upon the testimony of the witness Norma A. Moench to remove the bar of the statute. She testified that she knew plaintiff and decedent for



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As to point (2): Plaintiff contends that the evidence established a new promise to repay the debt and a payment on account thereof, and therefore the case was taken out of the five year Statute of Limitations. Defendant contends that the evidence of plaintiff is insufficient to remove the bar of the statute and that it failed to show that the decedent made a payment on the obligation with an express or implied promise to pay the balance and under circumstances clearly identifying the debt. Plaintiff relies upon the testimony of the witness Norma A. Woonch to remove the bar of the statute. He testified that she knew plaintiff and decedent for

eighteen years and saw them frequently; that in the year 1939 she saw the decedent on an average of three or four times a week; that plaintiff's father was buried about January 15 or 18, 1939, and that on the Saturday after the funeral decedent made a dinner appointment with the witness at the Congress hotel; that during the morning of the day of the appointment decedent called her on the telephone and asked "if it would be all right to bring Beth along because her father had died and I said, Yes, it would be all right;" that plaintiff, the decedent and the witness had dinner at the Congress hotel about 7:30 p. m.; that "there was a conversation there. Miss Weber and Mr. McCormack had a conversation about \$1,000.00. She asked him for some money and she made a remark, 'I want the money I loaned you, one thousand dollars' and the man pulled \$50.00 out of his pocket and handed it over to her and said, 'This will help you. Business is a little bit better than it was and I will return the rest as soon as I can.' That was all that was said in regard to the money. She thanked him for it." Upon cross-examination the witness testified that before Judge O'Connell upon the trial of the claim in the Probate court she testified in reference to the conversation at <sup>the</sup> dinner as follows: "We were sympathizing with her and she said to McCormack at the table, she talked about one thousand dollars that she had given him and he pulled out \$50.00 out of his pocket and handed it to her and told her that was on account and it was all he had, but he would give her the rest later. That was all the remark at the table and we discontinued the conversation entirely." The rule that governs the instant question is stated in Abdill v. Abdill, 292 Ill. 231. There the evidence relied upon to take the case out of the statute was as follows (pp. 233, 234): "\* \* \* that George W. Abdill, within five years before the suit was brought, told his partner that he had not paid the plaintiff the consideration for the deed; that in the summer of 1914, within five years before the suit was brought, the plaintiff came to the office of George W. Abdill and said that he



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the morning of the day of the appointment decedent called her on  
appointment with the witness at the Congress hotel; that during  
that on the Saturday after the funeral decedent made a dinner  
plaintiff's father was buried about January 15 or 18, 1939, and  
saw the decedent on an average of three or four times a week; that  
eighteen years and saw them frequently; that in the year 1939 she



had been offered \$16,000 for the coal underlying his land but he was tied up by the deed he had made to Abdill so that he could not make a deed; that plaintiff at that time made considerable noise, cursing and damning about the condition he was tied up in by having that offer made when he could not make a sale by reason of being tied up with the deed to George W. Abdill, and that Abdill listened a while to his noise and finally rose up and said, 'That's enough, young man; I will see that you get paid for the coal as much as you were offered,' or words to that effect." In passing upon the question as to whether the evidence was sufficient to take the case out of the statute the court states (p. 234):

"No formal set of words is necessary to constitute an acknowledgment of a debt and a promise to pay it. An absolute acknowledgment of the continuance of the debt and a promise to pay it is sufficient, and any language of the debtor to the creditor clearly admitting the debt and showing an intention to pay it will take the case out of the statute. (Mellick v. DeSeelhorst, Breese, 221; Keener v. Crull, 19 Ill. 189; Horner v. Starkey, 27 id. 13; Sennott v. Horner & Hypes, 30 id. 429; Wooters v. King, 54 id. 343; O'Hara v. Murphy, 196 id. 599; 17 R. C. L. 897.) The evidence clearly identified the debt as being the consideration for the coal and minerals under the plaintiff's land. It established beyond question by the admission of George W. Abdill that the debt had not been paid, and there was a promise by him to pay to the plaintiff the amount he had been offered for the coal and mineral rights, which the plaintiff then stated to be \$16,000. The evidence satisfied every requirement of the law to remove the bar of the Statute of Limitations."

Under the foregoing rule and the evidence of the witness <sup>plaintiff</sup> Moench we are constrained to hold that made out a prima facie showing that took the case out of the bar of the statute.

We have carefully considered the contention of defendant

had been offered \$10,000 for the coal underlying his land but he was tied up by the deed he had made to Abell so that he could not make a deed; that plaintiff at that time made considerable noise, cursing and damning about the condition he was tied up in by having that offer made when he could not make a sale by reason of being tied up with the deed to George W. Abell, and that Abell listened a while to his noise and finally rose up and said, "What's wrong, young man; I will see that you get paid for the coal as much as you were offered, or I will see that effect." In making you the question as to whether the evidence was sufficient to take the case out of the statute the court states (p. 234):

"The formal act of words is necessary to constitute an acknowledgment of a debt and a promise to pay it. An acknowledgment of the continuance of the debt and a promise to pay it is sufficient, and any language of the debtor to the creditor clearly admitting the debt and showing an intention to pay it will take the case out of the statute. (*Willis v. Pennsylvania, Brown*, 321; *Keener v. Grall*, 19 Ill. 189; *Hodges v. Barker*, 27 Ill. 134; *Remond v. Henry*, 30 Ill. 439; *Montana v. Linn*, 34 Ill. 343; *Clare v. Murphy*, 126 Ill. 199; 17 C. C. 897.) The evidence clearly identified the debt as being the consideration for the coal and minerals under the plaintiff's land. It established beyond question by the admission of George W. Abell that the debt had not been paid, and that he was a promise by him to pay to the plaintiff the amount he had been offered for the coal and minerals rights, which the plaintiff then stated to be \$10,000. The evidence satisfied every requirement of the law to remove the case out of the statute of limitations."

Under the foregoing facts and the evidence of the plaintiff we are constrained to hold that plaintiff made out a prima facie showing that took the case out of the bar of the statute. We have carefully considered the contention of defendant

that because plaintiff failed to file a reply to paragraph two of defendant's answer we may assume that the loan, if made, was the result of an illegal transaction and that therefore plaintiff could not maintain the instant action, and we find it without real merit.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE  
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.



that because plaintiff failed to file a reply to defendant's motion we may assume that the law, in fact, was the result of an illegal transaction and that plaintiff's failure to file a reply to defendant's motion was not within the framework of the law and as such is illegal.

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JUDGMENT REVERSED AND CAUSE  
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Witness, P. J. and William, J. COURT.

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SECURITY DISCOUNT CORPORATION,  
a corporation,

Appellee,

v.

GRACE JACKSON,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On March 23, 1942, a judgment by confession was entered against defendant for \$1,100 upon two notes, one for \$395 and one for \$910, each secured by a chattel mortgage. The \$1,100 included attorney's fees of \$150. On April 6, 1942, defendant filed a verified petition to vacate the judgment and for leave to defend; also a demand for trial by jury. On April 8, 1942, the following order was entered: "\* \* \* that judgment be opened, and that leave be and hereby is given to the defendant to appear and make defense herein, that a trial of this cause be had notwithstanding said judgment, and that said judgment stand as security, petition to stand as affidavit of defense, and that execution herein be stayed until the further order of this Court. It is further ordered by the Court that leave be and the same is hereby given plaintiff to file a reply in ten (10) days." On May 12, 1942, an order was entered transferring the cause to the Chief Justice of the court "for re-assignment to Jury Calendar." Plaintiff did not file a reply to defendant's petition, but on July 3, 1942, filed a verified motion for a summary judgment. On the same date Judge Green entered an order continuing the motion for a summary judgment "to July 14th, 1942," and ordering defendant to file a counter-affidavit in seven days. On July 10, 1942, Judge Green entered the following judgment in the cause:

"Hearing on motion.

"This cause coming on for hearing upon the motion of the plaintiff heretofore entered herein for a Summary Judgment and

SECURITY TRUST COMPANY, INC.  
 a corporation,  
 Appellee,  
 v.  
 GRACE JACOBSON,  
 Appellant.

COURT OF APPEALS  
 FIRST JUDICIAL DISTRICT

MR. JUSTICE SCHWABER DELIVERED THE OPINION OF THE COURT.  
 On March 23, 1942, a judgment by confession was entered against defendant for \$1,100 upon two notes, one for \$300 and one for \$800, each secured by a chattel mortgage. The \$1,100 included attorney's fees of \$100. On April 6, 1942, defendant filed a verified petition to vacate the judgment and for leave to defend; also a demand for trial by jury. On April 8, 1942, the following order was entered: " \* \* \* that judgment be opened and that leave be and hereby is given to the defendant to appear and make defense herein, that a trial of this cause be had notwithstanding said judgment, and that said judgment stand as security, petition to stand as affidavit of defense, and that execution herein be stayed until the further order of this Court. It is further ordered by the Court that leave be and the same is hereby given plaintiff to file a reply in ten (10) days." On May 12, 1942, an order was entered transferring the cause to the chief justice of the court "for re-assignment to July Calendar." Plaintiff did not file a reply to defendant's petition, but on July 3, 1942, filed a verified motion for summary judgment. On the same date Judge Green entered an order continuing the motion for a summary judgment "to July 15th, 1942," and ordering defendant to file a counter-affidavit in seven days. On July 10, 1942, Judge Green entered the following judgment in the cause:

"Hearing on motion.

"This cause coming on for hearing upon the motion of the

plaintiff, heretofore entered herein for a summary judgment and



the Court being fully advised in the premises sustains said motion.

"Judgment by confession of March 23rd, 1942 against the defendant, Grace Jackson, for Eleven Hundred and 00/100 Dollars (\$1100.00) confirmed with costs.

"Bond set at \$1400.00."

On July 11, 1942, a "Counter Affidavit of Defendant in Opposition of Plaintiff's Motion for Summary Judgment" was filed. On July 21, 1942, defendant filed a motion to vacate the order and judgment of July 10, 1942, and in support of the motion filed a verified petition. On the same date Judge Holland denied defendant's motion. On July 31, 1942, upon motion of plaintiff, the clerk of the court was ordered to return to the bailiff of the court the execution, the same to remain in full force and effect in the hands of the bailiff. On August 14, 1942, upon motion of plaintiff, the record was corrected nunc pro tunc as of March 23, 1942, "to show the word 'Company' in lieu of the word 'Corporation' wherever the same may appear in the records for the name of the Plaintiff." On August 14, 1942, defendant filed a motion and verified petition "To Vacate Original Judgment, and Summary Judgments, in the Above Entitled Cause." On August 18, 1942, the trial court overruled the motion. Defendant appeals.

Many contentions are raised by defendant, but in our view of this appeal it is only necessary for us to pass upon one, viz., that the trial court erred in entering the judgment of July 10, 1942; erred in denying defendant's several motions to vacate the said judgment, and that defendant thereby has been denied her day in court and denied a trial by jury. This contention is plainly a meritorious one. Plaintiff made no motion to strike defendant's verified petition to vacate the judgment by confession and for leave to defend, thereby

The Court being fully advised in the premises, it is so ordered.  
Motion.

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no motion to strike defendant's verified petition to vacate  
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conceding, impliedly, that defendant's verified petition set up a meritorious defense. In the order of April 8, 1942, wherein the judgment was opened and leave given defendant to appear and make defense, plaintiff was given leave to file a reply to defendant's petition in ten days, but it did not see fit to file a reply. The order of April 8, 1942, was entered by Judge Green. The order transferring the cause to the Chief Justice for re-assignment to jury calendar was entered by Judge Hartigan. In spite of that order plaintiff made its motion for a summary judgment before Judge Green. In the brief filed in this court by defendant, on November 9, 1942, our attention was called to the fact that when plaintiff's motion for a summary judgment came up for hearing before Judge Green he entered an order continuing the motion "to July 14th, 1942," and ordering defendant to file a counter-affidavit in seven days, and counsel for defendant strenuously argued here that the trial court had no right to enter the judgment of July 10, 1942; that the motion for summary judgment could not be arbitrarily advanced upon the call for hearing, especially without notice to defendant, and that the judgment of July 10, 1942, entered in the absence of defendant and her counsel, savors of a snap judgment. After defendant's brief had been filed in this court counsel for plaintiff obtained three extensions of time, totaling ninety days, in which to file plaintiff's brief, which was not filed until March 9, 1943. On March 2, 1943, plaintiff filed in this court an additional record, from which it appears that on February 11, 1943, plaintiff filed a motion and petition before Judge Holland in which it asked that the record of the Municipal court be corrected so that it would show that the judgment in the cause was entered on July 14, 1942, instead of July 10, 1942. The motion was supported by a verified petition made by the attorney for plaintiff, in which he alleges that the clerk of the Municipal court



Accordingly, finally, that defendant's verified petition set up a veridical defense. In the order of April 1, 1942, wherein the judgment was entered and leave given defendant to appear and make defense, plaintiff was given leave to file a reply to defendant's petition in ten days, but it did not see fit to file a reply. The order of April 1, 1942, was entered by Judge Green. The order transferring the case to the Chief Justice for re-assignment to Judge Green was entered by Judge Green. In view of that order, plaintiff made his motion for a summary judgment before Judge Green. In the brief filed in this court by defendant, on November 9, 1942, our attention was called to the fact that when plaintiff's motion for a summary judgment came up for hearing before Judge Green he entered an order continuing the motion "to July 14th, 1942," and ordering defendant to file a counter-affidavit in seven days, and counsel for defendant strenuously argued here that the trial court had no right to enter the judgment of July 10, 1942; that the motion for summary judgment could not be summarily advanced upon the call for hearing, especially without notice to defendant, and that the judgment of July 10, 1942, entered in the absence of defendant and her counsel, savors of a snap judgment. After defendant's brief had been filed in this court counsel for plaintiff obtained leave extension of time, totaling ninety days, in which to file plaintiff's brief, which was not filed until March 9, 1943. On March 9, 1943, plaintiff filed in this court an additional reply, in which it appears that on February 11, 1943, plaintiff filed a motion and petition before Judge Green in which it asked that the report of the trial court be corrected so that it would show that the judgment in the cause was entered on July 14, 1942, instead of July 10, 1942. The motion was supported by a verified petition made by the attorney for plaintiff, in which he alleges that the clerk of the municipal court

erroneously recorded the date of the judgment in question as of July 10, 1942; that Judge Holland entered the following order on February 9, 1943: "On motion of the plaintiff in this cause, it is ordered by the Court that the date of judgment order of July 10th, 1942, be and the same is hereby corrected to read 'July 14th, 1942' in order that the date of Summary Judgment reflect the truth as to date of its entry." No facts are recited therein that would justify the so-called correcting of the record, and as Judge Holland had nothing to do with the entering of the judgment in question, he, of course, had no memoranda, indeed, no personal knowledge as to the entering of the judgment. In the record that was filed in this court by defendant it appears that in the many proceedings that took place in the cause after the entry of the judgment in question, the date of the judgment is always stated as of July 10, 1942. On July 28, 1942, plaintiff filed a petition praying that an order be entered directing the clerk of the court to notify the bailiff of the release of the stay of execution. This petition was verified by plaintiff's attorney, and he twice states therein that the order confirming the original judgment by confession was entered on July 10, 1942. On July 28, 1942, plaintiff moved the court for an order on the clerk to return to the bailiff the execution heretofore stayed and in support of the motion counsel for plaintiff filed a brief with the clerk of the court in which he twice states that the judgment was confirmed on July 10, 1942. On August 14, 1942, plaintiff's attorney made a motion to correct the record nunc pro tunc as of March 23, 1942, to show the word "Company" in lieu of the word "Corporation," "wherever the same may appear in the records for the name of the Plaintiff," but plaintiff's counsel never, in any way, questioned the record as to the date of the judgment until February 11, 1943. Upon the entire record, we hold that the judgment confirming the judgment by confession was

erroneously recorded the date of the judgment in question as of July 10, 1942; that Judge Holland entered the following order on February 9, 1943: "On motion of the Plaintiff in this cause, it is ordered by the Court that the date of judgment enter on July 10th, 1942, be and the same is hereby corrected to read 'July 14th, 1942' in order that the date of summary judgment reflect the truth as to date of its entry." No facts are recited therein that would justify the so-called correcting of the entry, and as Judge Holland had nothing to do with the entering of the judgment in question, he, of course, had no memoranda, indeed, no personal knowledge as to the entering of the judgment. In the record that was filed in this court by defendant it appears that in the many proceedings that took place in the case after the entry of the judgment in question, the date of the judgment is always stated as of July 10, 1942. On July 20, 1942, plaintiff filed a petition praying that an order be entered directing the clerk of the court to notify the bailiff of the release of the stay of execution. This petition was verified by plaintiff's attorney, and he twice states therein that the order confirming the original judgment by confession was entered on July 10, 1942. On July 28, 1942, plaintiff moved the court for an order on the clerk to return to the bailiff the execution heretofore stayed and in support of the motion counsel for plaintiff filed a brief with the clerk of the court in which he twice states that the judgment was confirmed on July 10, 1942. On August 14, 1942, plaintiff's attorney made a motion to correct the record and to change as of March 23, 1942, to show the word "Company" in lieu of the word "Corporation," "wherever the same may appear in the records for the name of the Plaintiff," but plaintiff's counsel never, in any way, questioned the record as to the date of the judgment until February 11, 1943. Upon the entire record, we hold that the judgment confirming the judgment by confession was



entered on July 10, 1942, and that the trial court committed reversible error in entering the judgment upon that date and in thereafter refusing to allow defendant's several motions to vacate the same. It will be noted that while plaintiff had moved for a summary judgment the judgment entered by Judge Green upon that motion was one confirming the judgment by confession of March 23, 1942. There is a substantial difference between a summary judgment and a judgment confirming the judgment by confession. The purpose of a proceeding for summary judgment is to determine whether a defense exists. In the instant case, when defendant was let in to plead and defend the cause stood for trial upon the pleadings, and the burden was upon plaintiff to prove its case under the law in the same way it would have been compelled to do had there been no judgment entered by confession, and defendant, under her demand, was entitled to a trial by jury. Plaintiff sought to avoid such a trial by moving for a summary judgment, but the judgment entered upon its motion was neither responsive to its motion nor a proper one to enter.

But if it be assumed that the judgment by confession was entered on July 14, 1942, and if it be further assumed that said judgment can be treated as a proper one to enter upon a motion for summary judgment, nevertheless, we would hold that the trial court erred in entering it. The alleged consideration for the two notes in question was the sale, in two separate transactions, of certain trucks and other goods and chattels by plaintiff to defendant. Plaintiff concedes that defendant made a number of monthly payments on each of the notes but contends that she made default in the installments due plaintiff on March 20, 1942, and that it was because of these defaults that it took judgment by confession. If plaintiff did not take the judgment entered upon its motion for a summary judgment until July 14, 1942, there was then on file, in addition to the petition of defendant to

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the same. It will be noted that while plaintiff has moved for  
thereafter refusing to allow defendant's several motions to vacate  
irrevocable order in entering the judgment upon that date and in  
entered on July 10, 1942, and that the trial court admitted

vacate the judgment by confession, the counter-affidavit of defendant in opposition to plaintiff's motion for summary judgment, which was filed July 11, 1942, and no motion to strike this counter-affidavit was made by plaintiff. The counter-affidavit set up, inter alia:

"Grace Jackson, defendant in the above entitled cause being first duly sworn on oath, with respect to plaintiff's motion for summary judgment, shows unto the court the following facts and matters of defense on her part to plaintiff's suit and claim herein.

"1. That plaintiff's affidavit is insufficient in substance and form to support a motion for summary judgment, under the rules appertaining.

"2. That plaintiff's affidavit consists of conclusions and does not allege facts.

"3. That in the year 1941, at the time of the transactions herein involved, plaintiff was engaged in the business of 'Used Car Dealer'; that plaintiff did not, as defendant is informed, have a license to operate said business as is required by the Laws of the State of Illinois.

"4. That plaintiff is an Illinois corporation; that pursuant to its charter, it had no authority to buy, sell or otherwise deal in used automobiles.

"5. That on to-wit, April 23, 1941, plaintiff did make, execute and deliver her note in the sum of Three Hundred Ninety Five Dollars, secured by Chattel mortgage, in payment of the purchase price of two used trucks sold and delivered by plaintiff to defendant, and did pay the installments as and when the same became due to and including March, 1942, and did thereafter pay sufficient monies to discharge the balance thereof, but that plaintiff, contrary, to the direction of the defendant, undertook to apply the same on the transaction hereinafter set forth.



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which was filed July 11, 1942, and no motion to strike this  
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matters of defense on her part to plaintiff's suit and claims  
herein.

"1. That plaintiff's affidavit is inconsistent in substance  
and form to support a motion for summary judgment, under the rules  
appertaining.

"2. That plaintiff's affidavit consists of conclusions and  
does not allege facts.

"3. That in the year 1941, at the time of the transactions  
herein involved, plaintiff was engaged in the business of 'Used  
Car Dealer'; that plaintiff did not, as defendant is informed,  
have a license to operate said business as is required by the  
laws of the state of Illinois.

"4. That plaintiff is an Illinois corporation; that  
pursuant to its charter, it had no authority to buy, sell or  
otherwise deal in used automobiles.

"5. That on to-wit, April 22, 1941, plaintiff did make,  
execute and deliver her note in the sum of Three Hundred thirty  
five dollars, secured by chattel mortgage, in payment of the  
purchase price of two used trucks sold and delivered by plaintiff  
to defendant, and did pay the installments as and when the same  
became due to and including March, 1942, and did thereafter pay  
sufficient money to discharge the balance thereof, but that  
plaintiff, contrary to the direction of the defendant, undertook  
to apply the same in the transaction hereinafter set forth.

"6. That on to-wit, August 26, 1941, plaintiff proposed a sale of three trucks and certain equipment to defendant for the sum of Six Hundred Dollars, said trucks were in a broken-down condition, and could not then be operated by their own power until certain repairs and materials were installed in the same necessary to use them; that plaintiff stated it would loan to defendant the sum of One Hundred Thirty Dollars, with which to make said repairs and did thereupon deliver to defendant its two checks, one in the sum of One Hundred Thirty Dollars, all of which was used in the repair of said trucks and in addition thereto, defendant expended the sum of to-wit, Seventy Five Dollars, in installing new batteries, in excess of the sum of One Hundred Thirty Dollars, and the second check in the sum of Seventy Dollars, which plaintiff directed defendant to endorse and return to it, which she did; that it was represented that said sum was to be credited to commissions and charges.

"7. That the total consideration received by this defendant on said transaction of August 26, 1941, were the trucks amounting to Six Hundred Dollars, and the sum of One Hundred Thirty Dollars; that she did thereupon execute and deliver to plaintiff, a note in the sum of Nine Hundred Ten Dollars, and her Chattel Mortgage to secure the same.

"8. That plaintiff to induce defendant to execute the note of August 26, 1941, did represent to defendant, that it would deliver to defendant, Certificates of Title for each of said trucks, that it did not have said Certificates of Title in its possession, but would by the time the repairs had been completed, deliver, or cause them to be delivered to defendant; that defendant relying upon said representations and promises of plaintiff so made, did purchase said trucks and did make and execute the aforesaid note and Chattel Mortgage; that said promises so made by plaintiff to furnish said defendant with Certificates of Title were false and untrue, and



6. That on August 26, 1941, plaintiff delivered to defendant

a sale of three trucks and certain equipment to defendant for the

sum of Six Hundred Dollars, said trucks were in a reasonably

condition, and would not have been covered by their own power

until certain repairs and alterations were installed in the trucks

necessary to use them; that plaintiff agreed it would loan to

defendant the sum of One Hundred thirty Dollars, with which to

make said repairs and said transportation deliver to defendant its two

checks, one in the sum of One Hundred thirty Dollars, all of which

was used in the repair of said trucks and in addition plaintiff

defendant expended the sum of twenty-five Dollars, in

installing new batteries, in excess of the sum of One Hundred thirty

Dollars, and the second check in the sum of Seventy Dollars, which

plaintiff directed defendant to endorse and return to it, which she

did; that it was represented that said sum was to be credited to

commissions and charges.

7. That the total consideration received by this defendant

on said transaction of August 26, 1941, was the trucks amounting to

Six Hundred Dollars, and the sum of One Hundred thirty Dollars; that

she did thereupon execute and deliver to plaintiff, a note in the

sum of Five Hundred ten Dollars, and her Checkel for same to

secure the same.

8. That plaintiff to induce defendant to execute the note

of August 26, 1941, did represent to defendant, that it would deliver

to defendant, Certificates of Title for each of said trucks, that

it did not have said Certificates of Title in its possession, but

would by the time the repairs had been completed, deliver, or cause

them to be delivered to defendant; that defendant relying upon said

representations and promises of plaintiff so made, did purchase

said trucks and did make and execute the above note and Checkel

for same; that said promises so made by plaintiff to defendant and



made for the purpose of inducing the purchase of said trucks and the execution of the aforesaid note and Chattel Mortgage; that it did at no time deliver to defendant said Certificates of Title, but did deliver to defendant, a letter, a copy of which is hereto attached, with reference to a Certificate of Title on one of said trucks, with directions to defendant to secure the same; that at the time of the making of said promises, as aforesaid, plaintiff had no intention of fulfilling said promises, that the consideration for said note, failed for the reasons aforesaid.

"9. That plaintiff from time to time promised to secure said Certificates of Title, and on the basis of said promises, defendant did make the payments of Fifty Dollars, on October 10, 1941, and on October 31, 1941.

"10. That the payments made on November 10, 1941, and January 8, 1942, amounting to One Hundred Dollars, were made on account of the note of April 23, 1941, and plaintiff was so directed to apply the same, that said note of April 23, 1941, has been fully paid by the monies remaining in the hands of plaintiff.

"11. That on April 16, 1942, and on many occasions prior thereto, defendant requested plaintiff to accept the return of said trucks and equipment and to cancel and return the note and Chattel Mortgage given therefor; that on said April 16, 1942, pursuant to the request of defendant, the three trucks and equipment referred to in the transaction of August 26, 1941, were delivered to and received by plaintiff and that said note of August 26, 1941, and Chattel Mortgage of even date, should have been cancelled and returned to defendant.

"12. That plaintiff did make a charge for the extension of credit in the purchase of the two trucks in April, 1941 of approximately twenty five per cent as interest and carrying charges and did in the note of August 26, 1941, include therein the sum of One Hundred Eighty Dollars, as interest and carrying charges

made for the purpose of insuring the purchase of said trucks and the execution of the above note and chattel mortgage; that it did at no time deliver to defendant said certificates of title, but did deliver to defendant, a letter, a copy of which is hereto attached, with reference to a Certificate of title on one of said trucks, with directions to defendant to secure the same; that at the time of the making of said process, an affidavit, signed by had no intention of fulfilling said promise, that the consideration for said note, failed for the reasons aforesaid.

"9. That plaintiff from time to time refused to receive said Certificates of title, and on the basis of said process, defendant did make the payments of fifty dollars, on October 10, 1941, and on October 31, 1941.

"10. That the payments made on November 10, 1941, and January 8, 1942, amounting to the amount of dollars, were made on account of the note of April 23, 1941, and plaintiff was so directed to apply the same, that said note of April 23, 1941, has been fully paid by the monies remaining in the hands of plaintiff.

"11. That on April 16, 1942, and on many occasions prior thereto, defendant requested plaintiff to accept the return of said trucks and equipment and to cancel and return the note and Chattel Mortgage given therefor; that on said April 16, 1942, pursuant to the request of defendant, the three trucks and equipment returned to in the transaction of August 26, 1941, were delivered to and received by plaintiff and that said note of August 26, 1941, and Chattel Mortgage of even date, should have been cancelled and returned to defendant.

"12. That plaintiff did make a charge for the execution of credit in the books of the two trucks in April, 1941 of approximately twenty five per cent interest and carrying charges and did in the note of August 26, 1941, include therein the sum of one hundred fifty dollars, as interest and carrying charges.



amounting in excess of twenty five per cent, contrary to the Usury Statute of this State, in force and effect at said time.

"13. That there is due and owing to defendant from plaintiff, paid as usurious interest on the note, of April 23, 1941, to-wit, Ninety Five Dollars; that plaintiff has in its hands excess payments in the sum of Ninety Three Dollars, that defendant has expended to-wit Seventy Five Dollars, for materials placed in said trucks and delivered to plaintiff, for which said sums, plaintiff is indebted to defendant.

"Grace Jackson"

If the judgment entered upon the motion for a summary judgment be considered as one in the nature of a summary judgment, what is the law bearing upon a motion for a summary judgment?

Plaintiff's affidavit for summary judgment is to be strictly construed and the right to judgment must be free from doubt. Summary judgments should not be entered where the trial judge would have to decide controverted questions of fact. If the defense is "arguable," "apparent," or "made in good faith" it should be submitted to a jury. (See Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523; Barrett v. Shanks, 300 Ill. App. 119, 126; Gliwa v. Washington Polish Loan & Bldg. Ass'n, 310 Ill. App. 465, 470. To quote from the last mentioned case (pp. 470, 471):

"Defendant points out the rules which guide the courts. The procedure may not be used to impair right of trial by jury. Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523. The purpose of the procedure is not to try an issue of fact as that term is used in law but rather to try whether there is an issue of fact between the parties within the legal meaning. The method is necessarily inquisitorial. The pleadings (important) are not controlling. If it appears from facts stated in affidavits or documents that the answer pleaded is sham or false or frivolous it will be disregarded. If there is a material issue of fact it



amounting in excess of twenty five per cent, contrary to the  
Usury Statute of this State, in force and effect at said time.  
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to-wit, Ninety Five Dollars; that Plaintiff has in its hands and  
payments in the sum of Ninety Three Dollars, that defendant has  
expended to-wit, Seventy Five Dollars, for materials placed in said  
trucks and delivered to Plaintiff, for which said sum, Plaintiff  
is indebted to defendant.

"Cross Motion"

If the judgment entered upon the motion for a summary judgment  
might be considered as one in the nature of a summary judgment, what  
is the law bearing upon a motion for a summary judgment?  
Plaintiff's affidavit for summary judgment is to be strictly  
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jury. (See Diversey Liquefying Corp. v. Henningsen, 370 Ill. 583;  
Larson v. Sparks, 300 Ill. App. 119, 126; Giles v. Washington Trolley  
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term is used in law but rather to try whether there is an issue  
of fact between the parties within the legal meaning. The method  
is necessarily inflexible. The pleadings (defendant) are not  
controlling. If it appears from facts stated in affidavits or  
documents that the answer pleaded is sham or false or frivolous  
it will be stricken. If there is a material issue of fact it

must be submitted to a jury. In Berick v. Curran, 55 R. I. 193, 179 Atl. 708, 710, this procedure is well described as 'a two-edged weapon - useful if it precludes the interposition of defenses for delay, but dangerous if it deprives a defendant of the opportunity to have a trial of seriously contested questions of fact or law.'

"The authorities say affidavits for plaintiff should be construed strictly, those for defendants liberally. Shientag, 4 Fordham L. R. 186; Gleason v. Hoeke, 5 App. Dist. of Col. 1, 4-5; Fidelity & Deposit Co. v. United States for use of Smoot, 187 U. S. 315, 320; Wells v. Alropa Construction Corp., 82 Fed. (2d) 887, 889, are cited.

"Plaintiff's right to judgment should be free from doubt. Lord Esher in Sheppards & Co. v. Wilkinson & Jarvis, 6 T. L. R. 13, and many other cases,

"Even if defense papers are found insufficient, judgment should not be ordered unless plaintiff's affidavit (strictly construed) leaves no question of defendant's liability. People for use of Dyer v. Sanculius, 284 Ill. App. 463, 474-475; Weiss v. Goldberger, 209 App. Div. 615, 205 N. Y. S. 1, 3; 4 Fordham L. R. 216; Wm. H. Frear & Co., Inc. v. Bailey, 127 Misc. 79, 214 N. Y. S. 675, 677.

"If the defense is 'arguable,' 'apparent,' made in 'good faith' it should be submitted to a jury. Fidelity & Deposit Co. v. United States for use of Smoot, 187 U. S. 315, 320. The court is bound to accept statement of facts as true when alleged in defendant's affidavits. The whole record must be considered."

In our judgment it is idle to argue that the counter-affidavit of defendant, tested by the aforesaid rules of law, sets up no defense to any part of plaintiff's claim. Her contention that she has been deprived of her right to her day in court and to a trial by jury is clearly a meritorious one.

We feel impelled to say that, in any view of this record,



must be admitted to a jury. In Perick v. Jones, 55 R. I. 193,

179 Atl. 708, 710, this procedure is well described as a two-edged

weapon - useful in it provides the interposition of defense for

delay, but dangerous in it deprives a defendant of the opportunity

to have a trial of seriously contested questions of fact or law.

"The authorities say affidavits for plaintiff should be

construed strictly, those for defendants liberally. Plaintiff, 4

Forham L. R. 186; Gleason v. Hooper, 5 App. Dist. of Col. 1, 4-5;

Fidelity & Deposit Co. v. United States for use of Moore, 187 U. S.

312, 320; Wells v. Alstora Construction Corp., 82 Fed. (2d) 117,

589, are cited.

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Lord Fisher in Chapman & Co. v. Wilkinson & Jarvis, 6 T. L. R. 13,

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strued) leaves no question of defendant's liability. People for

Use of Dyer v. Sanchell, 204 Ill. App. 463, 474-475; Wells v.

Goldberger, 209 App. Div. 61, 202 N. Y. S. 2d 1, 3; 4 Forham L. R.

216; W. R. Trer & Co., Inc. v. Bailey, 127 Misc. 79, 214 N. Y. S.

675, 677.

"If the defense is 'arbitrary', 'apparent', made in 'good

faith', it should be admitted to a jury. Fidelity & Deposit Co.

v. United States for use of Moore, 187 U. S. 312, 320. The court

is bound to accept statement of facts as true when alleged in

defendant's affidavits. The whole record must be considered."

In our judgment it is idle to argue that the counter-

affidavit of defendant, tested by the aforesaid rules of law,

sets up no defense to any part of plaintiff's claim. Her con-

dition that she has been deprived of her right to her day in

court and to a trial by jury is clearly a malicious one.

It is implied to say that, in any view of this record,



the allowance of \$150 for attorney's fees in the judgment by confession was very excessive. See the opinion of Mr. Justice O'Connor in Schmoldt v. Chicago Stone Setting Co., 309 Ill. App. 377, 381, wherein he held that no court ought to allow \$200 for confessing judgment on a \$2,500 note. In the instant case, plaintiff claimed that defendant owed it \$950. The provision in each of the notes for the allowance of attorney's fees applies only in case judgment is entered by confession. (See Schmoldt v. Chicago Stone Setting Co., supra, p. 381.) Here, plaintiff, after defendant had been allowed to plead and defend and had demanded a jury trial, was not satisfied to pursue the usual course to final judgment, at which time, if it prevailed, it would obtain a judgment confirming the judgment by confession, but it sought a summary judgment, and in such a proceeding it had no right to have attorney's fees allowed.

Each party has raised and argued a number of technical points, but we are satisfied that the instant appeal can and should be determined upon equitable grounds.

Defendant has filed a motion to dismiss the appeal. It will be denied.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded with directions to the trial court to enter an order denying plaintiff's motion for a summary judgment and to allow defendant a jury trial, in accordance with her demand.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.



41759

FRANK OLINSKI,  
Appellee,

v.

MILK WAGON DRIVERS' UNION,  
LOCAL 753, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, STABLEMEN AND  
HELPERS OF AMERICA, and STEVE  
C. SUMNER, individually and as  
Secretary and Treasurer of the  
Milk Wagon Drivers' Union, Local  
753, International Brotherhood of  
Teamsters, Chauffeurs, Stablemen  
and Helpers of America,  
Appellants.

320 I.A. 1871

276  
APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.  
108 A

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Milk Wagon Drivers' Union, Local 753, of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America (hereinafter referred to as the Union), and Steve C. Sumner, individually and as Secretary and Treasurer of the Union, from an equity decree against them. Frank Olinski, plaintiff, filed a suit at law against the Union and nine individuals sued individually and as officers of the Union to recover sick benefits under the Union sick benefit by-laws. The cause was transferred to the chancery side of the court. The second amended complaint filed was against the Union and Sumner, individually and as secretary and treasurer of the Union. Defendants filed an answer, to which plaintiff filed a reply, and the cause was referred to a master in chancery, who took evidence and reported his findings of fact, conclusions of law, and his recommendation that a decree be entered in favor of plaintiff. Defendants' objections to the master's report were overruled and the master's report came on for hearing before Chancellor Finnegan. After a hearing the master's report was approved in toto and a decree was entered in favor of plaintiff and against the Union and Sumner in the sum of \$4,000, with interest after the date of the decree. The



300 I.A. 108

41252

FRANK OLIN ET AL.  
Appellants.

v.

MILK MAOON DRIVERS' UNION,  
LOCAL 753, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,  
CHAUDEMAN, TAYLOR AND  
WILLIAMS OF ALABAMA, and SEVERAL  
OTHERS, Individually and as  
Secretary and Treasurer of the  
Milk Union Drivers' Union, Local  
753, International Brotherhood of  
Teamsters, Defendants,  
and Relates of Appellants.  
Appellants.

THE JUSTICE COURT HAS DELIVERED THE VERDICT OF THE COURT.

This is an appeal by the Milk Union Drivers' Union, Local

753, of the International Brotherhood of Teamsters, Defendants,

Chaudeman and Williams of America (hereinafter referred to as

the Union), and SEVERAL OTHERS, Individually and as Secretary

and Treasurer of the Union, from an equity decree against them.

Frank Olin, Plaintiff, filed a suit as law against the Union

and nine individuals and individually and as officers of the

Union to recover sick benefits under the Union sick benefit

by-laws. The cause was transferred to the chancery side of

the court. The second amended complaint filed was against

the Union and Olin, individually and as secretary and

treasurer of the Union. Defendants filed an answer, to which

Plaintiff filed a reply, and the cause was referred to a master

in chancery, who took evidence and reported his findings of fact,

conclusions of law, and his recommendation that a decree be

entered in favor of Plaintiff. Defendants' objections to the

master's report were overruled and the master's report came on

for hearing before Chancellor Huggins. After a hearing the

master's report was approved in toto and a decree was entered

in favor of Plaintiff and against the Union and Olin in the

sum of \$4,000, with interest after the date of the decree. The

decree also provided that defendants be directed to pay plaintiff "the sum of \$20 per week commencing one week after the entry of the decree herein and for and during the entire period of his illness and disability." The court retained jurisdiction of the cause for the purpose of enforcing the directions and orders contained in the decree. Defendants appeal from the decree.

Plaintiff was a milk wagon driver and about May, 1919, he became a member of the Union and he was still a member in good standing on February 3, 1935, the date that he was severely injured while driving his milk wagon. On or about January 1, 1922, the Union enacted certain by-laws which were in full force and effect on February 3, 1935. In December, 1935, the Union amended its by-laws as to sick benefits and these amendments came into effect on January 1, 1936. At the time the briefs were filed in this court in the instant case the Supreme court had not decided Fichter v. Milk Wagon Drivers' Union, 382 Ill. 91. That decision decides certain of the points raised by defendants in the instant case and adversely to them and upon the oral argument of this cause counsel for defendants abandoned all of the points raised in their brief save three, viz: (1) "Under section L of the 1936 by-laws Olinski did not have any right to payment of sick benefits because he was not 'continuously employed' for ten years within the meaning of those by-laws." (2) "Even assuming that plaintiff's rights were governed by the 1922 by-laws in effect at the time of his injury, his remedies or proceedings to enforce those rights are governed by the by-laws in effect at the time he seeks to enforce those rights. Plaintiff's failure to comply with these procedural or remedial provisions prevents him from maintaining this suit." (3) "The trial court erred in entering a decree on January 31, 1941, requiring defendants to pay plaintiff in installments at \$20 per week commencing the week after January 31, 1941. A. Defendant Union's lia-



decree also provided that defendant be directed to pay plaintiff the sum of \$20 per week commencing one week after the entry of the decree herein and for and during the entire period of his illness and disability. The court retained jurisdiction of the cause for the purpose of enforcing the directions and orders contained in the decree. Defendant's appeal from the decree.

Plaintiff was a milk wagon driver and about May, 1919, he became a member of the Union and he was still a member in good standing on February 3, 1932, the date that he was severely injured while driving his milk wagon. On or about January 1, 1932, the Union enacted certain by-laws which were in full force and effect on February 3, 1932. In December, 1932, the Union amended its by-laws as to sick benefits and these amendments came into effect on January 1, 1933. At the time the briefs were filed in this court in the instant case the Supreme Court had not decided Fichter v. Milk Wagon Drivers' Union, 382 Ill. 91. That decision decides certain of the points raised by defendants in the instant case and adversely to them and upon the oral argument of this cause counsel for defendants abandoned all of the points raised in their brief save three, viz: (1) "Under section 1 of the 1933 by-laws Plaintiff did not have any right to payment of sick benefits because he was not 'continuously employed' for ten years within the meaning of those by-laws." (2) "Even assuming that Plaintiff's rights were governed by the 1932 by-laws in effect at the time of his injury, his remedies or proceedings to enforce those rights are governed by the by-laws in effect at the time he seeks to enforce those rights. Plaintiff's failure to comply with these procedural or remedial provisions prevents him from maintaining this suit." (3) "The trial court erred in entering a decree on January 31, 1941, requiring defendant to pay plaintiff in installments at \$20 per week commencing



bility to pay \$20 per week was a several liability for each week as it accrued. No court could conclusively adjudicate defendants' liability for any week subsequent to the date of the entry of the decree on January 31, 1941. B. The trial court erred in entering a decree requiring the defendants to pay future disability installments week by week and in attempting to retain jurisdiction over such portion of the decree. C. The plaintiff's recovery was limited to the time of the evidence disclosed at the hearing before the master."

As to point (1): Subsection L of section 42 of the by-laws of 1936 provides as follows: "\* \* \* After ten (10) years continuous employment, in good standing, the member will be entitled to sick benefit the full time he is sick. Sick benefits shall be paid only when member is in good standing six months prior to date of sickness \* \* \*." Defendants state that Olinski began work as a milk wagon driver in 1919; that in 1923 he left that work and operated a soft drink parlor for about ten months, when he resumed work as a milk wagon driver; that in March, 1925, he did not work as a driver for about ninety days because he had sustained an injury to his right foot, and that during the year 1929 he took a three months' vacation, and defendants contend that under such a state of facts he had no right to the payment of sick benefits because he was not "continuously employed" for ten years within the meaning of the by-laws of 1936. Plaintiff contends that the Supreme court in the Fichter case held that the by-laws of 1936 will not operate retroactively to defeat the vested rights of plaintiff to sick benefits acquired under the by-laws of 1922. This contention of plaintiff is a meritorious one and disposes of defendants' contention. Plaintiff argues at length that even if the by-laws of 1936 governed plaintiff's right to sick benefits, nevertheless, plaintiff under said by-laws was entitled to his sick benefits. While this contention seems to be

ability to pay \$20 per week was a several liability for each week as it accrued. No court could conclusively adjudicate defendants' liability for any week subsequent to the date of the entry of the decree on January 31, 1941. B. The trial court erred in entering a decree requiring the defendants to pay future disability installments week by week and in attempting to retain jurisdiction over such portion of the decree. C. The plaintiff's recovery was limited to the time of the evidence disclosed at the hearing before the master."

As to point (1): Subsection 1 of section 42 of the by-laws of 1936 provides as follows: " \* \* \* After ten (10) years continuous employment, in good standing, the member will be entitled to sick benefit the full time he is sick. Sick benefits shall be paid only when member is in good standing six months prior to date of sickness \* \* \*." Defendants state that Olinski began work as a milk wagon driver in 1919; that in 1923 he left that work and operated a soft drink parlor for about ten months, when he resumed work as a milk wagon driver; that in March, 1925, he did not work as a driver for about ninety days because he had sustained an injury to his right foot, and that during the year 1929 he took a three months' vacation, and defendants contend that under such a state of facts he had no right to the payment of sick benefits because he was not "continuously employed" for ten years within the meaning of the by-laws of 1936. Plaintiff contends that the Supreme court in the Lighter case held that the by-laws of 1936 will not operate retroactively to defeat the vested rights of plaintiff to sick benefits acquired under the by-laws of 1922. This contention of plaintiff is a meritorious one and disposes of defendants' contention. Plaintiff argues at length that even if the by-laws of 1936 governed plaintiff's right to sick benefits, nevertheless, plaintiff under said by-laws was entitled to his sick benefits. While this contention seems to be



a meritorious one we do not deem it necessary to decide it.

As to point (2): The by-laws of the Union that came into full force and effect on January 1, 1936, contained the following provision: "When a claim for sick or death benefit has been made and refused, or the Executive Board is unable to reach a settlement of a claim made or refused, then the case shall be settled as follows: Said member or his representative shall select one, and these two shall select a third. The verdict of the three shall be final." The by-laws of 1922 contained no such provision. The master found that on May 2, 1937, the executive board of defendant association "held a meeting and sought to compromise and settle the claim of the plaintiff, but that the plaintiff refused to arbitrate the said matter and still refuses so to do." Defendants contend that the arbitration provision in the by-laws of 1936 "constituted a condition precedent to the maintenance of any action by the plaintiff under any claims arising under the by-laws," and that a court should deny plaintiff the relief he seeks in his action because he refused to comply with the arbitration provision. The arbitration provision in the 1936 by-laws was but one of a number of provisions contained in the by-laws that were designed not only to affect future cases that might arise, but to relieve the Union from its obligations under the 1922 by-laws. In our judgment the Fichter case disposes of defendants' instant contention, and adversely to defendants. Plaintiff argues that even if the 1936 by-laws applied to his claim the said arbitration provision was not a condition precedent to the maintenance of the instant suit; that either party to an arbitration agreement can terminate the arbitration agreement by giving notice of revocation, and that in the instant case the present suit was a sufficient notice to defendants that plaintiff revoked the said agreement. We do not deem it necessary to pass upon this contention.



upon this contention. We do not deem it necessary to pass present suit was a sufficient notice to defendants that plaintiff by giving notice of revocation, and that in the instant case the arbitration agreement can terminate the arbitration agreement to the maintenance of the instant suit; that either party to an claim the said arbitration provision was not a condition precedent plaintiff argues that even if the 1936 by-laws applied to this defendants' instant contention, and adversely to defendants, 1922 by-laws. In our judgment the Flinter case disposes of arise, but to relieve the Union from its obligations under the that were designed not only to affect future cases that might was but one of a number of provisions contained in the by-laws arbitration provision. The arbitration provision in the 1936 by-laws seeks in his action because he refused to comply with the arbitration provision, and that a court should deny plaintiff the relief he any action by the plaintiff under any claims arising under the of 1936 "constituted a condition precedent to the maintenance of Defendants contend that the arbitration provision in the by-laws refused to arbitrate the said matter and still refuses so to do." and settle the claim of the plaintiff, but that the plaintiff defendant association "held a meeting and sought to compromise The master found that on May 2, 1937, the executive board of shall be final." The by-laws of 1922 contained no such provision and these two shall select a third. The verdict of the three as follows: Said member or his representative shall select one, ment of a claim made or refused, then the case shall be settled and refused, or the Executive Board is unable to reach a settlement provision: "When a claim for sick or death benefit has been made full force and effect on January 1, 1936, contained the following As to point (2): The by-laws of the Union that came into a meritators one we do not deem it necessary to decide it.

As to point (3): Defendants contend that the trial court erred in entering a decree requiring defendants to pay future disability installments week by week; that "defendant union's liability to pay \$20 per week was a several liability for each week as it accrued. No court could conclusively adjudicate defendants' liability for any week subsequent to the date of the entry of the decree on January 31, 1941. Equity, though more liberal than law, limits relief to the time of the decree." The following answer made by plaintiff to defendants' contention is a complete answer to the contention: "This is a suit in equity for specific performance of a contract between the plaintiff and the Milk Union. The latter had agreed to pay plaintiff the sum of \$20 for and during the entire period of his illness, provided he was a member in good standing continuously for three months prior to the date of his illness. The Court is fully warranted in entering a decree adjudicating the amount due and providing and directing that the payments continue for and during the entire period of his illness. No sound reason exists why plaintiff should be compelled to file weekly successive actions at law. The relief at law is utterly inadequate and impracticable and to remit the plaintiff to multiple lawsuits would fail in maintaining and dispensing justice which is the great object of all enlightened jurisprudence. The decree preserves the rights of the Union as agreed on between it and its members as set out in the by-laws. It can avail itself thereof subject to the supervision and power of the Court to compel either or both parties to comply with his or its obligations in accordance with the by-laws." In defendants' argument they do not state how plaintiff should proceed to enforce the weekly installments that would fall due after the date of the decree. We might assume, however, from their argument that it is their position that as defendants' obligation to pay \$20 per week accrued



As to point (3): Defendants contend that the trial court

erred in entering a decree requiring defendants to pay future disability installments week by week; that "defendant union's liability to pay \$20 per week was a several liability for each week as it accrued. No court could conclusively adjudicate defendants' liability for any week subsequent to the date of the entry of the decree on January 31, 1941. Equity, though more liberal than law, limits relief to the time of the decree." The following answer made by plaintiff to defendants' contention is a complete answer to the contention: "This is a suit in equity for specific performance of a contract between the plaintiff and the Milk Union. The latter had agreed to pay plaintiff the sum of \$20 for and during the entire period of his illness, provided he was a member in good standing continuously for three months prior to the date of his illness. The Court is fully warranted in entering a decree adjudicating the amount due and providing and directing that the payments continue for and during the entire period of his illness. No sound reason exists why plaintiff should be compelled to file weekly successive actions at law. The relief at law is utterly inadequate and impracticable and to remit the plaintiff to multiple lawsuits would fail in maintaining and dispensing justice which is the great object of all enlightened jurisprudence. The decree preserves the rights of the Union as agreed on between it and its members as set out in the by-laws. It can avail itself thereof subject to the supervision and power of the Court to compel either or both parties to comply with his or its obligations in accordance with the by-laws." In defendants' argument they do not state how plaintiff should proceed to enforce the weekly installments that would fall due after the date of the decree. We might assume, however, from their argument that it is their position that as defendants' obligation to pay \$20 per week accrued



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weekly, he would have to enforce his rights by weekly actions at law. No good reason can be advanced why plaintiff should be compelled to follow such a procedure. Indeed, such a procedure would eventually tend to destroy his right to sick benefits. He filed his complaint in chancery to avoid a multiplicity of suits, and should future conditions warrant a change in the order, the chancellor, having retained jurisdiction, will be able to protect the rights of the Union.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

weekly, he would have to enforce his rights by weekly actions at law. No good reason can be advanced why plaintiff should be compelled to follow such a procedure. Indeed, such a procedure would eventually lead to destroy his right to sick benefits. He filed his complaint in order to avoid a multiplicity of suits, and should future conditions warrant a change in the order, the chancellor, having retained jurisdiction, will be able to protect the rights of the Union. The decree of the Circuit Court of Cook County is

affirmed.

DECEMBER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

42332

LULU I. KNAUS,  
Appellee,

v.

M. R. C. FINANCE CORPORATION,  
a corporation,  
Appellant.

3202A-787  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.  
1097

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in the nature of trover brought by plaintiff against defendant, claiming damages for the conversion of an automobile and its contents. In a trial before the court without a jury there was the following finding: "The court finds the issues on plaintiff's statement of claim and defendant's counter-claim against the defendant, M.R.C. Finance Corp., a Corp., and assesses <sup>the</sup> the plaintiff's damages at the sum of Five Hundred and 00/100 Dollars." Defendant appeals from a judgment entered upon the finding.

Plaintiff has not filed an appearance nor a brief in this court. However, we have been greatly aided in our consideration of the appeal by the opinion delivered by the trial court in deciding the case.

On December 28, 1937, plaintiff executed and delivered to defendant a chattel mortgage securing her note for \$720. The mortgage covered all of the fixtures in a tavern conducted by plaintiff, and in addition a Dodge automobile. \$120 of the amount of the note was usury, although defendant sought to disguise this fact by inserting in the application for the loan that plaintiff agreed to pay one Marshall Levy a fee of \$120 "for placing or securing said loan and it is understood that said Fee shall be paid as soon as said loan is granted." Levy was an officer of defendant company and its agent in the matter of the loan and he also played an important part in certain proceedings that later followed. After plaintiff had defaulted upon several weekly payments defendant foreclosed



JULI I. KNUSS  
Appellee,

v.

M. H. C. MINION CORPORATION,  
a corporation,  
Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

NOV 10 1937

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

An action in the nature of trover brought by plaintiff against defendant, claiming damages for the conversion of an automobile and its contents. In a trial before the court without a jury there was the following finding: "The court finds the issues on plaintiff's statement of claim and defendant's counter-claim against the defendant, M.H.C. Finance Corp., a Corp., and assigns the plaintiff's damages at the sum of Five Hundred and 00/100 Dollars." Defendant appeals from a judgment entered upon the finding. Plaintiff has not filed an appearance nor a brief in this court. However, we have been greatly aided in our consideration of the appeal by the opinion delivered by the trial court in deciding the case.

On December 28, 1937, plaintiff executed and delivered to defendant a chattel mortgage securing her note for \$750. The mortgage covered all of the fixtures in a tavern conducted by plaintiff, and in addition a Dodge automobile. 120 of the amount of the note was money, although defendant sought to disavow this fact by inserting in the application for the loan that plaintiff agreed to pay one Marshall Levy a fee of \$120 "for placing or securing said loan and it is understood that said fee shall be paid as soon as said loan is granted." Levy was an officer of defendant company and its agent in the matter of the loan and he also played an important part in certain proceedings that later followed. After plaintiff had defaulted upon several weekly payments defendant foreclosed

the chattel mortgage and took possession of all of the property covered by the mortgage except the automobile, and on May 28, 1938, an alleged sale of the fixtures took place at the tavern. When Levy was on the stand the following occurred: "Q. Well, you were running the sale, weren't you? A. Yes, Mr. Shields. Q. You made a charge for running that sale? A. That is correct. Q. How much was that charge? A. I don't know. Q. Who was the auctioneer? A. I was. Q. You were the auctioneer? A. Yes. Mr. Shields [attorney for plaintiff]: May I see that exhibit, Your Honor, for a moment? Q. 'Agent's Fees, \$25.00'. Who was that agent? A. I was. Q. Then you got an auctioneer's fee of \$25.00? A. That's right. Q. You got an agent's fee of \$25.00. That was \$50.00. And this insurance fee of \$15.00. Who was that paid to? A. I would assume that insurance would be paid to the insurance company; but I don't recall offhand. \* \* \* Q. Well, then, with your agent's fees of \$25.00, custodian's fee of \$15.00, and your auctioneer fee of \$25.00, you have charged \$65.00 to the Knauss's for services here, haven't you? A. Yes. Q. Who was the buyer at that sale? A. I don't recall now. Q. Can you refresh your recollection? A. Yes. Well, it says Ben Garfinkel was the buyer. Q. He bought them and paid the money to you, didn't he? A. I don't recall whether he paid the money to me or paid the money to the company. Q. But he paid for them? A. Yes. Q. And they were his property? A. I don't recall that, whether he bought them or whether he bought them for Michael Tauber Company, whom he represented. Q. Then Michael Tauber would be the owner, or Garfinkel? A. Yes." Defendant's report of the chattel mortgage sale made by Levy, its agent, states that all of the chattels were sold at said sale to Ben Garfinkel for \$285 and that the total expenses of the sale were \$80. But on June 4, 1938, a conditional sales contract between defendant company and Joseph Bonafede was executed. By this contract defendant sold to Bonafede,

the chattel mortgage and took possession of all of the property covered by the mortgage except the automobile, and on May 25, 1938, an alleged sale of the fixtures took place at the tavern. When Levy was on the stand the following occurred: "Q. Well, you were running the sale, weren't you? A. Yes, Mr. Shields. Q. You made a charge for running that sale? A. That is correct. Q. How much was that charge? A. I don't know. Q. Who was the auctioneer? A. I was. Q. You were the auctioneer? A. Yes, Mr. Shields [attorney for plaintiff]: I say I saw that exhibit, your honor, for a moment? Q. Agent's fees, \$25.00. Who was that agent? A. I was. Q. Then you got an auctioneer's fee of \$25.00? A. That's right. Q. You got an agent's fee of \$25.00. That was \$50.00. And this insurance fee of \$15.00, who was that paid to? A. I would assume that insurance would be paid to the insurance company; but I don't recall offhand. \* \* \* Q. Well, then, with your agent's fees of \$25.00, auctioneer's fee of \$25.00, and your auctioneer fee of \$25.00, you have charged \$75.00 to the Kansas's for services here, haven't you? A. Yes. Q. Who was the buyer at that sale? A. I don't recall now. Q. Can you refresh your recollection? A. Yes, well, it says Ben Garlinkoff was the buyer. Q. He bought them and paid the money to you, didn't he? A. I don't recall whether he paid the money to me or paid the money to the company. Q. But he paid for them? A. Yes. Q. And they were his property? A. I don't recall that, whether he bought them or whether he bought them for Michael Tripp Company, whom he represented. Q. Then Michael Tripp would be the owner, or Garlinkoff? A. Yes." Defendant's report of the chattel mortgage sale made by Levy, its agent, states that all of the chattels were sold at said sale to Ben Garlinkoff for \$25.00 and that the total expenses of the sale were \$80.00. But on June 4, 1938, a conditional sales contract between defendant company and Joseph Bonafede was executed. By this contract defendant sold to Bonafede,



for \$510, all of the chattels that were supposed to have been sold to Garfinkel on May 28, 1938. The said agreement contains the following language: "It is clearly understood that the BUYER [Bonafede] is buying only that right, title and interest in the following described property as acquired by the SELLER [defendant] at a chattel mortgage sale, held on the premises on May 28, 1938." (Italics ours.) Levy testified that defendant collected the \$510 from Bonafede under the conditional sales agreement.

In February, 1940, defendant located the automobile upon the premises of Nora O'Hara, plaintiff's landlady, replevied it, and sold it at a foreclosure sale under the chattel mortgage in question on March 26, 1940, for \$75. In April, 1940, plaintiff commenced the instant proceedings.

Defendant contends that Garfinkel was the buyer at the sale held March 28, 1938; that he paid for the chattels only \$285; that plaintiff at the time of the sale owed defendant \$450; that the \$285 was insufficient to cover said indebtedness, and that therefore plaintiff was indebted to defendant at the time the latter replevied the automobile, in February, 1940. Defendant concedes, in its brief, that it "had a duty to obtain as large a price as possible for the property at a public sale," but that "it performed that duty by holding the public sale according to the statute." Plaintiff claimed that defendant failed to perform its duty at the sale; that the sale was a fraudulent one and in disregard of plaintiff's rights; that no such person as Garfinkel actually figured in the sale; that defendant, through its officer and agent, Levy, in some manner, fraudulently sold or delivered the chattels to itself for a grossly insufficient amount and then sold them to Bonafede; that the most that defendant could claim that plaintiff owed it at the time of the sale, even if the \$120 usury item be disregarded, was \$450, and that after it received

for \$210, all of the chattels that were supposed to have been sold to Garfinkel on May 28, 1938. The said agreement contains

the following language: "It is clearly understood that the BUYER [Bonafede] is buying only that right, title and interest in the following described property as acquired by the seller [defendant] at a chattel mortgage sale, held on the premises on May 28, 1938." (Italics ours.) Levy testified that defendant

collected the \$210 from Bonafede under the conditional sales agreement.

In February, 1940, defendant located the automobile upon the premises of Nora O'Hara, plaintiff's landlady, replevied it, and sold it at a foreclosure sale under the chattel mortgage in question on March 26, 1940, for \$75. In April, 1940, plaintiff commenced the instant proceedings.

Defendant contends that Garfinkel was the buyer at the sale held March 26, 1938; that he paid for the chattels only \$285; that plaintiff at the time of the sale owed defendant \$450; that the \$285 was insufficient to cover said indebtedness, and that therefore plaintiff was indebted to defendant at the time the latter replevied the automobile, in February, 1940. Defendant concedes, in its brief, that it "had a duty to obtain as large a price as possible for the property at a public sale," but that "it performed that duty by holding the public sale according to the statute." Plaintiff claimed that defendant failed to perform its duty at the sale; that the sale was a fraudulent one and in disregard of plaintiff's rights; that no such person as Garfinkel actually figured in the sale; that defendant, through its officer and agent, Levy, in some manner, fraudulently sold or delivered the chattels to itself for a grossly insufficient amount and then sold them to Bonafede; that the most that defendant could claim that plaintiff owed it at the time of the sale, even if the \$150 navy item be disregarded, was \$450, and that after it received



\$510 from Bonafede for the chattels that amount was sufficient to satisfy the lien of the mortgage not only upon the chattels that were sold but upon the automobile that was not sold, and that when defendant replevied the automobile in February, 1940, plaintiff owed defendant nothing, in fact, that defendant had been overpaid. There is evidence tending to show that plaintiff paid \$4,050 for the "newly equipped tavern" in June, 1936.

To quote from the opinion of the trial court:

"The Court: Well, in deciding this case I am going to find for the plaintiff, on the theory that the lien of the chattel mortgage on the automobile was extinguished by the proceeds of the sale realized by the defendant company of the fixtures in the tavern. The basis for the finding is that the purported sale to Ben Garfinkel was a fraudulent and fake sale. No such sale ever took place. The documents admitted as Plaintiff's Exhibit 17 clearly indicate that. It is a conditional sales agreement drawn by the defendant company, signed by Bonafetti, the subsequent buyer, the first paragraph of which recites this:

"'It is clearly understood that the buyer ---', (who is Bonafetti in this agreement) is buying only that type of interest in the following described property as acquired by the seller,' -- and the seller in this exhibit is the M. R. C. Finance Corporation -- 'acquired by the seller at the chattel mortgage sale held on the premises on May 28th.'

"The only conclusion to be drawn from this language is there wasn't any Garfinkel in the case. This proposed sale to Garfinkel was a fraudulent and fake sale. That the defendant company, subsequent to this agreement, received the sum of \$510.00 from Bonafetti, thereby receiving sufficient to extinguish the amount that was still owned by the plaintiff in this case under any stretch of the imagination.

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\$210 from Bonafetti for the chattels that amount was sufficient to satisfy the lien of the mortgage not only upon the chattels that were sold but upon the automobile that was not sold, and that when defendant repaid the automobile in February, 1940, plaintiff owed defendant nothing, in fact, that defendant had been overpaid. There is evidence tending to show that plaintiff paid \$4,050 for the "newly equipped tavern" in June, 1936.

To quote from the opinion of the trial court:

"The Court: Well, in deciding this case I am going to find for the plaintiff, on the theory that the lien of the chattel mortgage on the automobile was extinguished by the proceeds of the sale realized by the defendant company of the fixtures in the tavern. The basis for the finding is that the purported sale to Ben Garlinkel was a fraudulent and false sale. No such sale ever took place. The documents admitted as Plaintiff's Exhibit 17 clearly indicate that it is a conditional sales agreement drawn by the defendant company, signed by Bonafetti, the subsequent buyer, the first paragraph of which recites this:

"It is clearly understood that the buyer -- (who is Bonafetti in this agreement) is buying only that type of interest in the following described property as required by the seller, -- and the seller in this exhibit is the M. R. C. Finance Corporation -- acquired by the seller at the chattel mortgage sale held on the premises on May 28th."

"The only conclusion to be drawn from this language is there wasn't any Garlinkel in the case. This proposed sale to Garlinkel was a fraudulent and false sale. That the defendant company, subsequent to this agreement, received the sum of \$210.00 from Bonafetti, thereby receiving sufficient to extinguish the amount that was still owed by the plaintiff in this case under any stretch of the imagination.

"According to the defendant's theory in this case the only amount they could claim due under that mortgage is \$450.00, even allowing that \$120.00 that the plaintiff in this action is supposed to have agreed to pay to Levy for the purpose of securing a loan from the company he represented. Such conduct, in my judgment is most reprehensible; and it is no wonder, when we hear evidence such as is admitted in this case, that the finance companies have such a reputation in this community - well, any community - when they conduct themselves in this fashion, to compel a prospective borrower to sign an agreement of this kind to agree to pay the agent of the lending company \$120.00 for commissions that he did not earn, for the purpose of securing a loan from his company, to a prospective borrower, in my judgment borders on the criminal, and should be so considered. Then, after he receives the money, the \$120.00, she is compelled -- or, she was compelled -- to sign a note for \$720.00.

"\* \* \*

"When the default occurred in the payment of the money under the terms of the mortgage, the defendant had a perfect right -- as I understand the law -- to foreclose this mortgage; and, as I see it, it was the duty of the defendant to conduct a sale under the terms of this mortgage fairly, openly and honestly. They should do that for many reasons that I can think of. The loss to the former owner under those circumstances, in nearly every case I can think of, is extreme. In most cases they have pledged property of the value of many times the amount of the loan; and when they find themselves in a position of being unable to comply with the terms of the loan, and such a foreclosure takes place, it is sacrificed on the market to buyers who might be invited there to bid on the chattels that are sold under the foreclosure; and certainly, all decent instincts, I think, should compel men to



"According to the defendant's theory in this case the only amount they could claim due under that mortgage is \$450.00, even allowing that \$120.00 that the plaintiff in this action is supposed to have agreed to pay to levy for the purpose of securing a loan from the company he represented. Such conduct, in my judgment is most reprehensible; and it is no wonder, when we hear evidence such as is admitted in this case, that the finance companies have such a reputation in this community - well, any community - when they conduct themselves in this fashion, to compel a prospective borrower to sign an agreement of this kind to agree to pay the agent of the lending company \$120.00 for commissions that he did not earn, for the purpose of securing a loan from his company, to a prospective borrower, in my judgment borders on the criminal, and should be so considered. Then, after he receives the money, the \$120.00, she is compelled --- or, she was compelled --- to sign a note for \$720.00.

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"When the default occurred in the payment of the money under the terms of the mortgage, the defendant had a perfect right - as I understand the law - to foreclose this mortgage; and, as I see it, it was the duty of the defendant to conduct a sale under the terms of this mortgage fairly, openly and honestly. They should do that for many reasons that I can think of. The loss to the former owner under those circumstances, in nearly every case I can think of, is extreme. In most cases they have pledged property of the value of many times the amount of the loan; and when they find themselves in a position of being unable to comply with the terms of the loan, and such a foreclosure takes place, it is sacrificed on the market to buyers who might be invited there to bid on the chattels that are sold under the foreclosure; and certainly, all decent instincts, I think, should compel men to



conduct such a sale fairly, openly and honestly to derive as much as possible under those circumstances to satisfy this amount of the indebtedness; and, if any excess is received from the sale they give it to the borrower.

"\* \* \* There wasn't an honest sale. It was sold to a man who is supposed to be named Garfinkel, who does not appear here. We don't know anything about him, except a name is used. \* \* \* That sale is supposed to have taken place on May 28th. Then a few days later, on June 4th, 1938, the defendant itself enters into a conditional sales contract with a man named Bonafetti for the same chattels that they had presumably theretofore, on May 28th, sold to Garfinkel. They did sell the same chattels to Bonafetti for \$510.00, which the evidence indicates Bonafetti paid prior to May of 1940, when the replevin suit for the balance on the automobile was instituted.

"The balance due under the terms of the mortgage, disregarding the question of usury, was \$450.00. Therefore, if they received \$510.00 from Bonafetti, surely they received sufficient to satisfy the lien of the mortgage; and sufficiently particularly to satisfy the lien of the mortgage insofar as the automobile is concerned."

The trial court states in his opinion that because of the fraud practiced by defendant in the sale of May 28, 1938, he thought that punitive damages should be assessed against it; that he was not clear that such damages could be assessed, but that he would award punitive damages in the amount of \$350 and let the Appellate court pass upon the question as to whether or not punitive damages could be awarded in the case. He therefore found that plaintiff had sustained actual damages of \$150 and that punitive damages in the sum of \$350 should be awarded.

Save as to the award for punitive damages we find ourselves in accord with the trial court's opinion, although we think that the usury item of \$120 might justly and legally have been deducted

contact with a sale fairly, openly and honestly to achieve the best possible price for the automobile, and if any credit is received from the sale they give it to the borrower.

"\* \* \* There wasn't an honest sale. It was said to a man who is supposed to be named Cardinal, who does not appear here. He doesn't know anything about him, except a name is used. \* \* \* That sale is supposed to have taken place on May 28, 1932. A few days later, on June 4th, 1932, the defendant issued orders into a conditional sales contract with a man named Bonafetti for the same vehicle that they had previously purchased, on May 28th, sold to Cardinal. They did sell the same vehicle to Bonafetti for \$10.00, which the evidence indicates Bonafetti paid prior to May of 1940, when the taxpayer sold for the balance on the automobile was installed.

"The balance due under the terms of the mortgage, disallowing the question of warranty, was \$450.00. Therefore, if they received \$10.00 from Bonafetti, surely they received sufficient to satisfy the lien of the mortgage; and satisfied fully particularly to satisfy the lien of the mortgage insofar as the automobile is concerned."

The trial court states in his opinion that because of the fraud practiced by defendant in the sale of May 28, 1932, he thought that punitive damages should be assessed against it; that he was not clear that such damages could be assessed, but that he would award punitive damages in the amount of \$350 and let the appellate court pass upon the question as to whether or not punitive damages could be awarded in the case. He therefore found that plaintiff had sustained actual damages of \$10 and that punitive damages in the sum of \$350 should be awarded.

He gave as to the award for punitive damages as find ourselves in accord with the trial court's opinion, although we think that



from the \$450 that defendant claimed was due it at the time of the sale on May 28, 1938.

Defendant raises several technical points in support of its contention that the judgment should be reversed in toto; but in view of the fact that the evidence shows that any claim it had against plaintiff under the chattel mortgage had been extinguished before it replevied the automobile, these points should have little, if any, weight in a case where the equities are clearly with the plaintiff.

Defendant contends that the trial court was not justified in assessing punitive damages against defendant. This contention is a meritorious one. It is not necessary for us to determine the question as to whether punitive damages can be assessed in a trover case. Here, plaintiff, in her statement of claim and bill of particulars, made no claim for any damages other than actual damages, nor did counsel for plaintiff during the trial make any claim that plaintiff was entitled to punitive damages. The trial court, in his opinion, first raised that question. After the decision of the court plaintiff's counsel made no effort to amend the pleadings. Under such a state of the record the contention of defendant that the court, in view of the pleadings and the position of plaintiff's counsel, had no right to award punitive damages is not without merit. A fortiori, plaintiff did not claim that there was any fraud in the replevin proceedings of February, 1940. The fraud committed by defendant was in the foreclosure sale of May 28, 1938, and the evidence of that fraud was competent and germane in the present proceedings solely because it showed that the entire debt of plaintiff under the chattel mortgage of December 28, 1937, had been extinguished long before the replevin action of February, 1940, was commenced. We hold, therefore, that the trial court was not warranted in awarding plaintiff punitive damages in the instant case.

That part of the judgment of the Municipal court of Chicago



from the \$450 that defendant claimed was due at the time of the sale on May 28, 1936.

Defendant raises several technical points in support of its contention that the judgment should be reversed in toto; but in view of the fact that the evidence shows that any claim is due against plaintiff under the oral mortgage had been extinguished before it repaid the automobile, these points should have little, if any, weight in a case where the equities are clearly with the plaintiff.

Defendant contends that the trial court was not justified in assessing punitive damages against defendant. This contention is a meritless one. It is not necessary for me to determine the question as to whether punitive damages can be assessed in a trover case. Here, plaintiff, in her statement of claim and bill of particulars, made no claim for any damages other than actual damages, nor did counsel for plaintiff during the trial make any claim that plaintiff was entitled to punitive damages. The trial court, in his opinion, first raised that question. After the decision of the court plaintiff's counsel made no effort to amend the pleadings. Under such a state of the record the contention of defendant that the court, in view of the findings and the position of plaintiff's counsel, had no right to award punitive damages is not without merit. A fortiori, plaintiff did not claim that there was any fraud in the repaid proceeds of February, 1940. The fraud committed by defendant was in the foreclosure sale of May 28, 1936, and the evidence of that fraud was competent and genuine in the present proceedings solely because it showed that the entire debt of plaintiff under the chattel mortgage of December 26, 1937, had been extinguished long before the repaid action of February, 1940, was commenced. It follows, therefore, that the trial court was not warranted in awarding plaintiff punitive damages in the instant case.

That part of the judgment of the Municipal Court of Chicago

finding the issues against defendant on its counterclaim is affirmed; that part of the judgment finding the issues on plaintiff's statement of claim against defendant and in favor of plaintiff and assessing plaintiff's damages at the sum of \$500 is reversed and judgment is entered here in favor of plaintiff and against defendant upon plaintiff's statement of claim in the sum of \$150.

JUDGMENT AFFIRMED IN PART,  
REVERSED IN PART, AND JUDGMENT  
HERE IN FAVOR OF PLAINTIFF AND  
AGAINST DEFENDANT IN THE SUM  
OF \$150.

Friend, P. J., and Sullivan, J., concur.

finding the same against defendant on its counterclaim is  
affirmed; that part of the judgment finding the issues on  
plaintiff's statement of claim against defendant and in favor  
of plaintiff and assessing plaintiff's damages at the sum of  
\$500 is reversed and judgment is entered here in favor of  
plaintiff and against defendant upon plaintiff's statement  
of claim in the sum of \$150.

JUDGMENT AFFIRMED IN PART,  
REVERSED IN PART, AND JUDGMENT  
ENTERED IN FAVOR OF PLAINTIFF AND  
AGAINST DEFENDANT IN THE SUM  
OF \$150.

Wm. P. Sullivan, J., concur.



320 I.A. 188

42577

STANDARD DISCOUNT COMPANY, INC.,  
a corporation,

Appellee,

v.

JACKSON FUNERAL SYSTEM ASSOCIATION,  
a corporation,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action based upon a duplicate of a membership certificate in the sum of \$250 issued by defendant and an assignment ~~made~~ ~~made~~ by Lucille Slappy to plaintiff of \$200 from the proceeds of the certificate. The certificate was issued to Ella Slappy, who died September 22, 1941. In a trial by the court the issues were found against defendant and judgment was entered against it for \$200. Defendant appeals.

Defendant strenuously contends that the finding of the trial court was contrary to the law and the evidence and that the judgment should be reversed and judgment entered here in favor of defendant. Plaintiff contends that the trial court saw and heard the witnesses and gave credence to the testimony for plaintiff, and that this court must assume that his conclusions as to the facts were correct.

We are satisfied that a statement of the salient facts will show that the trial court was not justified in finding for plaintiff. Defendant is a burial insurance society, organized and operating under the insurance laws of Illinois. On May 1, 1933, it issued a certificate to Ella Slappy, the decedent, in which Ada Lee, the sister of Ella, was named beneficiary. The certificate originally provided for benefits in the sum of \$150, but the amount was later increased to \$250. Lucille Slappy is a daughter of the decedent. On September 7, 1941, Lucille stated to George Williams, a collector for defendant, that the certificate had been misplaced or lost and that her mother wanted a duplicate

42577

830 I.A. 488

JACKSON FUNERAL SYSTEM ASSOCIATION,  
a corporation,  
Appellant,  
v.  
STANDARD DISCOUNT COMPANY, INC.,  
a corporation,  
Appellee,  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

An action based upon a duplicate of a membership certificate

in the sum of \$250 issued by defendant and an assignment ~~XXXXXX~~  
made by Lucille Slappy to plaintiff of \$200 from the proceeds of  
the certificate. The certificate was issued to Ella Slappy, who  
died September 23, 1941. In a trial by the court the issues were  
found against defendant and judgment was entered against it for  
\$200. Defendant appeals.

Defendant strenuously contends that the finding of the  
trial court was contrary to the law and the evidence and that  
the judgment should be reversed and judgment entered here in  
favor of defendant. Plaintiff contends that the trial court saw  
and heard the witnesses and gave credence to the testimony for  
plaintiff, and that this court must assume that his conclusions  
as to the facts were correct.

We are satisfied that a statement of the salient facts  
will show that the trial court was not justified in finding for  
plaintiff. Defendant is a burial insurance society, organized  
and operating under the insurance laws of Illinois. On May 1,  
1933, it issued a certificate to Ella Slappy, the decedent, in  
which Ada Lee, the sister of Ella, was named beneficiary. The  
certificate originally provided for benefits in the sum of \$150,  
but the amount was later increased to \$250. Lucille Slappy is  
a daughter of the decedent. On September 7, 1941, Lucille stated  
to George Williams, a collector for defendant, that the certificate



policy. Williams gave Lucille forms to be filled out and signed by Ella Slappy, and on September 8, 1941, Lucille returned to Williams the two forms, filled out. One form, entitled, "Request for Change of Beneficiary," is dated "9-8-41," and purports to be signed by Ella Slappy by her mark, and it requests that the beneficiary be changed from "Ada Lee, Sister," to "Lucille Slappy, Relationship daughter." The undisputed evidence shows that on September 8, 1941, Ella Slappy was suffering from a stroke; "couldn't talk" and "didn't understand what she was doing," and that the paralysis continued until her death. As Lucille had stated to Williams that the original policy was lost or misplaced, defendant issued and delivered to Lucille a duplicate of the original policy, upon the back of which appears the following: "Beneficiary Changed To: Lucille Slappy, Daughter 9-8-41. Leonard J. Livingston Secretary." Two days after the death of Ella Slappy, Ada Lee and Lucille Slappy appeared at the office of defendant and Ada delivered to defendant's claim adjuster the original policy and filed her claim under that policy with the adjuster and signed and verified a proof of claim under the original policy, in which she stated that she was the claimant under the policy. There is no evidence to indicate that Lucille made any objection to the aforesaid actions of Ada or that she interposed any objections to Ada's making a claim under the policy. On the same day there was presented to defendant a written assignment signed by Lucille Slappy and Ada Lee by the terms of which they assigned to M. Bynum & Chas. S. Jackson Co. \$240 of the proceeds to be paid under the said insurance certificate. On September 25, 1941, Ada Lee and Lucille Slappy went to the office of defendant and Lucille there stated to defendant's claim agent that Ella Slappy never signed any request for a change of beneficiary under the policy. Defendant then issued a check for \$240 to "Ada Lee, Benef. & Chas. S. Jackson Co. Und.



policy. Williams gave Lucille forms to be filled out and signed by Ella Slappy, and on September 8, 1941, Lucille returned to Williams the two forms, filled out. One form, entitled, "Request for Change of Beneficiary," is dated "9-8-41," and purports to be signed by Ella Slappy by her mark, and it requests that the beneficiary be changed from "Ada Lee, Sister," to "Lucille Slappy, Relationship daughter." The undisputed evidence shows that on September 8, 1941, Ella Slappy was suffering from a stroke; "couldn't talk" and "didn't understand what she was doing," and that the paralyzsis continued until her death. As Lucille had stated to Williams that the original policy was lost or misplaced, defendant issued and delivered to Lucille a duplicate of the original policy, upon the back of which appears the following: "Beneficiary Changed To: Lucille Slappy, Daughter 9-8-41. Leonard J. Livingston Secretary." Two days after the death of Ella Slappy, Ada Lee and Lucille Slappy appeared at the office of defendant and Ada delivered to defendant's claim adjuster the original policy and filed her claim under that policy with the adjuster and signed and verified a proof of claim under the original policy, in which she stated that she was the claimant under the policy. There is no evidence to indicate that Lucille made any objection to the aforesaid actions of Ada or that she interposed any objections to Ada's making a claim under the policy. On the same day there was presented to defendant a written assignment signed by Lucille Slappy and Ada Lee by the terms of which they assigned to M. Byrum & Chase, S. Jackson Co. \$240 of the proceeds to be paid under the said insurance certificate. On September 25, 1941, Ada Lee and Lucille Slappy went to the office of defendant and Lucille there stated to defendant's claim agent that Ella Slappy never signed any request for a change of beneficiary under the policy. Defendant then issued a check for \$240 to "Ada Lee, Benef. & Chase, S. Jackson Co. Und.

Assignee" and the check was duly paid. Later that day defendant received a letter from plaintiff in which it stated that it was inclosing an assignment on an insurance policy issued by defendant company on the life of Ella Slappy and that under the assignment Lucille Slappy assigned to plaintiff company for funeral expenses the sum of \$200. Accompanying plaintiff's letter was a written assignment signed by Lucille in which she assigns to Unity Funeral Parlors, or its successors and assigns, the sum of \$200 from the benefits of the policy or certificate, "which is to be paid from the benefits of the above mentioned policy or certificate, the consideration for the assignment of this amount being funeral services rendered in the burial of said deceased by said undertaker, which services have been accepted by us." This assignment authorized defendant company to make payment of the \$200 to Unity Funeral Parlors. It appoints plaintiff her attorney-in-fact with full power to make collection of, compromise, settle and receipt for the proceeds of said policy of insurance. There is no evidence that Lucille or Unity Funeral Parlors ever made any assignment to plaintiff, although plaintiff, in its statement of claim, bases its right to recover upon the theory that the assignment made by Lucille on September 23, 1941, was an assignment to it. It is plain that it was not. It also appears that counsel for plaintiff, Victor H. Bloom, in a letter he wrote to defendant on October 20, 1941, claimed that plaintiff was an assignee of Lucille Slappy. Prior to the burial of Ella Slappy there developed a contest over the possession of her body. Unity Funeral Parlors had taken possession of the body, but Lucille joined with her Aunt Ada in demanding that Charles S. Jackson Funeral Home be given possession of the body and have charge of the funeral. Unity Funeral Parlors refused to accede to the demand and stated that it would hold the body until it was paid \$175, its charge for a complete funeral. Thereupon Lucille and Ada went to the







law office of Attorney Gaines, on September 27, 1941, and after a conversation with the two women Attorney Gaines prepared a complaint for an injunction against Unity Funeral Parlors, which was signed and verified by Lucille. It contains the following paragraph: "That afterwards, to-wit, on the 24th day of September, 1941, the plaintiff, Lucille Slappy, informed the said agent of the Unity Funeral Home that the only available funds for the burial of the said deceased Ella Slappy consisted of a policy issued by the Jackson Funeral System Association, in which Ada Lee, the sister, was beneficiary, and that the said Ada Lee, had made arrangements with the Charles S. Jackson Funeral Home, located at 3800 South Michigan Avenue, for the burial of the said deceased." The complaint was presented to Judge Feinberg but what order, if any, was entered by the court does not appear from the record. However, the evidence shows that after the court proceedings Unity Funeral Parlors delivered the body to Charles S. Jackson Funeral Home, and the latter company conducted the funeral and burial. No claim against defendant was ever filed by Lucille, nor did plaintiff ever file a claim.

No other reasonable conclusion can be drawn from the evidence than that Ella Slappy, the insured, never made any request for a duplicate policy or for a change of beneficiary, and that Lucille obtained the duplicate of the original policy by false representations made to defendant's agent and by presenting to defendant a request for a change of beneficiary that purported to have been signed by Ella Slappy but that was not signed by her. Furthermore, Lucille, by her conduct after the death of Ella Slappy, would be estopped from asserting any claim against defendant under the duplicate policy. If she had sued defendant under that policy she could not have recovered, and the instant plaintiff claims to stand in her shoes. It is significant that

plaintiff claims to stand in her shoes. It is significant that under that policy she could not have recovered, and the instant defendant under the duplicate policy. If she had sued defendant Ella Slappy, would be estopped from asserting any claim against her. Furthermore, Lucille, by her conduct after the death of defendant, to have been signed by Ella Slappy but that was not signed by defendant a request for a change of beneficiary that purported representations made to defendant's agent and by presenting to Lucille obtained the duplicate of the original policy by false for a duplicate policy or for a change of beneficiary, and that hence than that Ella Slappy, the insured, never made any request No other reasonable conclusion can be drawn from the evidence a claim.

defendant was ever filed by Lucille, nor did plaintiff ever company conducted the funeral and burial. No claim against the body to Charles S. Jackson Funeral Home, and the latter that after the court proceedings Unity Funeral Parlor delivered does not appear from the record. However, the evidence shows Judge Weinberg but what order, if any, was entered by the court burial of the said deceased." The complaint was presented to Funeral Home, located at 3800 South Michigan Avenue, for the Ada Lee, had made arrangements with the Charles S. Jackson which Ada Lee, the sister, was beneficiary, and that the said of a policy issued by the Jackson Funeral System Association, in funds for the burial of the said deceased Ella Slappy contacted the said agent of the Unity Funeral Home that the only available day of September, 1941, the plaintiff, Lucille Slappy, informed following paragraph: "That afterwards, to-wit, on the 24th which was signed and verified by Lucille. It contains the complaint for an injunction against Unity Funeral Parlor, a conversation with the two women Attorney Gaines prepared a law office of Attorney Gaines, on September 27, 1941, and after

Unity Funeral Parlors, the assignee under the assignment made by Lucille on September 23, 1941, did not see fit to sue defendant under the assignment. When it was compelled to surrender the body of the decedent it is reasonable to presume that it concluded that it would have no standing in court to enforce any rights under the assignment, as that document provided that "consideration for the assignment of this amount being funeral services rendered in the burial of said deceased by said undertaker." The suit against defendant by the present plaintiff was an afterthought.

The judgment of the Municipal court of Chicago is reversed and judgment is entered here in favor of defendant.

JUDGMENT REVERSED AND JUDGMENT  
HERE IN FAVOR OF DEFENDANT.

Friend, P. J., and Sullivan, J., concur.



Unity Funeral Parlor, the assignee under the assignment made by Lucille on September 23, 1941, did not see fit to sue defendant under the assignment. When it was compelled to surrender the body of the decedent it is reasonable to presume that it concluded that it would have no standing in court to enforce any rights under the assignment, as that document provided that "consideration for the assignment of this amount being funeral services rendered in the burial of said deceased by said undertaker." The suit against defendant by the present plaintiff was an afterthought. The judgment of the Municipal Court of Chicago is reversed and judgment is entered here in favor of defendant.

JUDGMENT REVERSED AND JUDGMENT  
HEREIN IN FAVOR OF DEFENDANT.

Friend, P. J., and Sullivan, J., concur.

42628

320 I.A. 188<sup>2</sup>

GENERAL AMERICAN LIFE INSURANCE  
COMPANY, a corporation,  
Appellee,

v.

NORTH AMERICAN MANUFACTURING  
COMPANY, a corporation,  
Appellant.

APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On September 3, 1942, plaintiff filed a complaint and cognovit upon a written instrument - alleged to be a written lease - against defendant for rent alleged to be due for the period from June 27, 1942 to August 17, 1942, inclusive. On September 9, 1942, judgment by confession in the amount of \$890.50 was entered on the complaint. On October 7, 1942, defendant moved to open up the judgment and for leave to appear and defend, and an affidavit in support of the motion was filed. On November 30, 1942, the motion of defendant was denied and the judgment by confession was confirmed in the amount of \$830.50. Defendant appeals from that judgment.

Plaintiff claims that the written instrument upon which judgment was taken is a valid written lease. Defendant contends that it is not such a lease, and as the determination of this appeal practically turns upon our decision as to this dispute we deem it necessary to set up the alleged lease in full:

"As additional consideration for the cancellation of lease dated October 10th, 1941, between GENERAL AMERICAN LIFE INSURANCE COMPANY, lessor, and NORTH AMERICAN MANUFACTURING COMPANY, lessee, which lease has this day been cancelled upon its face, and the execution and delivery of mutual releases between said General American Life Insurance Company, Baird & Warner, Inc., and North American Mfg. Co., but not in limitation thereof, it is agreed as follows:

"FIRST: The General American Life Insurance Company does hereby waive and release the North American Mfg. Co. from

88-1A-330

GENERAL AMERICAN LIFE INSURANCE  
COMPANY, a corporation,

Appellee,

v.

NORTH AMERICAN MANUFACTURING  
COMPANY, a corporation,

Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

On September 3, 1942, plaintiff filed a complaint and sought  
 upon a written instrument - alleged to be a written lease - against  
 defendant for rent alleged to be due for the period from June 27,  
 1942 to August 17, 1942, inclusive. On September 9, 1942, judgment  
 by confession in the amount of \$330.70 was entered on the complaint.  
 On October 7, 1942, defendant moved to open up the judgment and for  
 leave to appear and defend, and an affidavit in support of the motion  
 was filed. On November 30, 1942, the motion of defendant was denied  
 and the judgment by confession was confirmed in the amount of  
 \$330.70. Defendant appeals from that judgment.

Plaintiff claims that the written instrument upon which judg-  
 ment was taken is a valid written lease. Defendant contends that  
 it is not such a lease, and as the determination of this appeal  
 practically turns upon our decision as to this dispute we deem it  
 necessary to set up the alleged lease in full:

"As additional consideration for the cancellation of lease  
 dated October 10th, 1941, between GENERAL AMERICAN LIFE INSURANCE  
 COMPANY, lessor, and NORTH AMERICAN MANUFACTURING COMPANY, lessee,  
 which lease has this day been cancelled upon its face, and the  
 execution and delivery of mutual releases between said General  
 American Life Insurance Company, Baird & Warner, Inc., and North  
 American Mfg. Co., but not in limitation thereof, it is agreed

as follows:

"FIRST: The General American Life Insurance Company  
 does hereby waive and release the North American Mfg. Co. from



payment of rent in any amount whatever for the month of February, 1942.

"SECOND: The North American Mfg. Co. hereby agrees to vacate the premises described in the aforesaid lease dated October 10th, 1941, on or before the 28th day of February, 1942.

"THIRD: The North American Mfg. Co. will allow General American Life Insurance Company, or Baird & Warner, Inc., its duly authorized agent, free access to the premises above referred to, for the purpose of examining or exhibiting the same, or to make any needful repairs or alterations of said premises which said General American Life Insurance Company may see fit to make, and will allow to have placed upon said premises at all times, notice of 'FOR SALE' and 'TO RENT', and will not interfere with the same.

"FOURTH: The North American Mfg. Co. will, on or before the 28th day of February, 1942, yield up possession of said premises to the General American Life Insurance Company, and failing so to do, will pay as liquidated damages for the whole time such possession is withheld, the sum of Fifteen Dollars (\$15.00) per day, but the provisions of this clause shall not be held as a waiver by the General American Life Insurance Company of any right of re-entry.

"FIFTH: If default be made in the payment of the above rent, or any part thereof, it shall be lawful for the General American Life Insurance Company at any time thereafter, at its election, without notice, to re-enter said premises or any part thereof, with or without process of law, and to remove the North American Mfg. Co., or any persons occupying the same, without prejudice to any remedies which might otherwise be used for such arrears of rent, and the General American Life Insurance Company shall have at all times, the right to distrain for rent due, and shall have a valid and first lien upon all personal property which the North American Mfg. Co. now owns or may hereafter

payment of rent in any amount whatever for the month of February, 1942.

"SECOND: The North American Mfg. Co. hereby agrees to vacate the premises described in the aforesaid lease dated October 10th, 1941, on or before the 28th day of February, 1942.

"THIRD: The North American Mfg. Co. will allow General American Life Insurance Company, or Baird & Warner, Inc., its duly authorized agent, free access to the premises above referred to, for the purpose of examining or exhibiting the same, or to make any needed repairs or alterations of said premises which said General American Life Insurance Company may see fit to make, and will allow to have placed upon said premises at all times, notice of 'FOR SALE' and 'TO RENT', and will not interfere with the same.

"FOURTH: The North American Mfg. Co. will, on or before the 28th day of February, 1942, yield up possession of said premises to the General American Life Insurance Company, and failing so to do, will pay as liquidated damages for the whole time such possession is withheld, the sum of Fifteen Dollars (\$15.00) per day, but the provisions of this clause shall not be held as a waiver by the General American Life Insurance Company of any right of re-entry.

"FIFTH: If default be made in the payment of the above rent, or any part thereof, it shall be lawful for the General American Life Insurance Company at any time thereafter, at its election, without notice, to re-enter said premises or any part thereof, with or without process of law, and to remove the North American Mfg. Co., or any persons occupying the same, without prejudice to any remedies which might otherwise be used for such arrears of rent, and the General American Life Insurance Company shall have at all times, the right to distrain for rent due, and shall have a valid and first lien upon all personal property which the North American Mfg. Co. now owns or may hereafter



acquire, or have an interest in, whether exempt by law or not, as security for payment of said rent of Fifteen Dollars (\$15.00) per day on and after March 1st, 1942.

"SIXTH: The North American Mfg. Co. does hereby irrevocably constitute any attorney of any Court of Record in any State, or of the United States, attorney for it and in its name, from time to time, to waive the issuance of process and service thereof, to waive trial by jury, to confess judgment in favor of the General American Life Insurance Company, its successors or assigns, and against the North American Mfg. Co., for the amount of rent which may be due for any period after the 1st day of March, 1942, at the rate of Fifteen Dollars (\$15.00) per day as aforesaid, together with the costs of such proceedings, and a reasonable sum for plaintiff's attorney's fees in or about the entry of such judgment, and for said purposes to file in said cause its cognovit thereof, and to make an agreement in said cognovit, or elsewhere, waiving and releasing all errors which may intervene in such proceeding, and waiving and releasing all right of appeal and right to writ of error and consenting to an immediate execution upon said judgment.

"IN WITNESS WHEREOF, the parties hereto have executed this instrument on the 28th day of January, A. D. 1942.

"GENERAL AMERICAN LIFE INSURANCE COMPANY

"By: BAIRD & WARNER, INC.

"By Warner G. Baird  
"President

"ATTEST:

"Harry F. Daley  
"Secretary

"NORTH AMERICAN MFG. CO.

"By S. Allyn Ward,  
"President

"ATTEST:

"Henry Bernstein  
"Secretary"



acquire, or have an interest in, whether exempt by law or not, as security for payment of said rent of fifteen Dollars (\$15.00) per day on and after March 1st, 1942.

"SIXTH: The North American Mfg. Co. does hereby irrevocably constitute any attorney of any Court of Record in any State, or of the United States, attorney for it and in its name, from time to time, to waive the issuance of process and service thereof, to waive trial by jury, to confess judgment in favor of the General American Life Insurance Company, its successors or assigns, and against the North American Mfg. Co., for the amount of rent which may be due for any period after the 1st day of March, 1942, at the rate of fifteen Dollars (\$15.00) per day as aforesaid, together with the costs of such proceedings, and a reasonable sum for plaintiff's attorney's fees in or about the entry of such judgment, and for said purpose to file in said cause its cognovit thereof, and to make an agreement in said cognovit, or elsewhere, waiving and releasing all errors which may intervene in such proceeding, and waiving and releasing all right of appeal and right to writ of error and consenting to an immediate execution upon said judgment.

"IN WITNESS WHEREOF, the parties hereto have executed this instrument on the 28th day of January, A. D. 1942.

"GENERAL AMERICAN LIFE INSURANCE COMPANY

"By: BAIRD & WARNER, INC.  
"By: Warner G. Baird  
"President

"ATTEST:

Hetty F. Daley  
"Secretary

"NORTH AMERICAN MFG. CO.

"By: S. Allan Ward  
"President

"ATTEST:

Hetty Bernsteins  
"Secretary

The affidavit filed in support of defendant's motion to vacate the judgment and for leave to defend is as follows:

"1. HENRY BERNSTEIN, being first duly sworn on oath, deposes and states that he is the Secretary and Treasurer of the NORTH AMERICAN MFG. CO., a corporation, defendant herein; that he personally knows the facts hereinafter set forth in this affidavit; that if called as a witness he would be competent to testify to the same.

"2. \* \* \*

"3. That the defendant herein has a good and meritorious defense to the cause of action herein, as follows; That on the 28th day of January, 1942, the parties hereto mutually cancelled the aforesaid lease dated October 10th, 1941, and agreed by said supplemental agreement hereinbefore referred to, which is a part of the record in the above entitled cause, that defendant should pay Fifteen Dollars (\$15.00) per day for each day after March 1st, 1942, and the parties then and there further agreed that defendant would continue to occupy the same premises without entering into any lease therefor, the terms and conditions of which occupancy, excepting the amount of rent, would be the same as contained in said written lease of the parties hereto dated October 10th, 1941, hereinbefore referred to as Exhibit A; and said plaintiff promised and assured this defendant that no changes whatever would be made in the operation of the premises in which this defendant was a tenant; that the continued use of the elevator by this defendant in accordance with the provisions of said lease dated October 10th, 1941, was specially promised and assured to this defendant by plaintiff.

"4. That the aforesaid printed lease dated October 10th, 1941, which was the only written lease between the parties hereto contained the following provision:

"'Lessee shall have use of elevators in common with other



The affidavit filed in support of defendant's motion to

vacate the judgment and for leave to defend is as follows:

"1. HENRY BERNSTEIN, being first duly sworn on oath,

deposes and states that he is the Secretary and Treasurer of

the NORTH AMERICAN MFG. CO., a corporation, defendant herein;

that he personally knows the facts hereinafter set forth in this

affidavit; that if called as a witness he would be competent to

testify to the same.

"2. \* \* \*

"3. That the defendant herein has a good and meritorious

defense to the cause of action herein, as follows: That on the

28th day of January, 1942, the parties hereto mutually cancelled

the aforesaid lease dated October 10th, 1941, and agreed by said

supplemental agreement heretofore referred to, which is a part

of the record in the above entitled cause, that defendant should

pay Fifteen Dollars (\$15.00) per day for each day after March

1st, 1942, and the parties then and there further agreed that

defendant would continue to occupy the same premises without

entering into any lease therefor, the terms and conditions of

which occupancy, excepting the amount of rent, would be the

same as contained in said written lease of the parties hereto

dated October 10th, 1941, heretofore referred to as Exhibit A;

and said plaintiff promised and assured this defendant that no

changes whatever would be made in the operation of the premises

in which this defendant was a tenant; that the continued use of

the elevator by this defendant in accordance with the provisions

of said lease dated October 10th, 1941, was specially promised

and assured to this defendant by plaintiff.

"4. That the aforesaid printed lease dated October 10th,

1941, which was the only written lease between the parties hereto

contained the following provision:

"Lessee shall have use of elevator in common with other



tenants daily (except Saturdays after 1:00 o'clock P.M., Sundays and holidays) during said hours,';

that said printed provision was physically stricken from said lease and the following provision inserted in a rider attached to said lease in lieu thereof, a copy of which rider is attached hereto and marked 'Exhibit B':

"'Lessee shall have use of freight elevator in common with other tenants daily during hours when building is open; and in addition is given the privilege of use of elevator after closing hours of the building provided lessee delegates one person in its personnel to operate the elevator according to building rules and provided lessee closes and locks the building after its use of elevator in a manner requested by lessor. Lessee agrees to caution its personnel in the operation of the elevator so that the elevator will not be overloaded and will be operated with due care and for the building property.';

that from the 28th day of January, 1942 to the 25th day of May, 1942, the plaintiff did carry out its promises and agreements contained in Exhibits A and B, and the promises and agreements made to defendant on January 28th, 1942.

"5. That defendant is engaged in the manufacture of fluorescent lighting equipment, transformers, and are in the production of war defense materials; that it has been supplying war defense materials which are allocated to the United States Army, Navy, Air Corps and other governmental agencies as well as to private industry; that as a result of the urgent need of such materials by governmental agencies and as a direct result of the freezing of certain of its products for private industry as of the 22nd day of June, 1942 by United States Government order, this defendant was operating its business during all 24 hours of the day; that the plaintiff herein knew of these facts and conditions, but notwithstanding such knowledge, and contrary

tenants daily (except Saturdays after 1:00 o'clock P.M., Sundays

and holidays) during said hours.;

that said printed provision as physically stricken from said lease and the following provision inserted in a rider attached to said lease in lieu thereof, a copy of which rider is attached

hereto and marked 'Exhibit B':

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with other tenants daily during hours when building is open;

and in addition is given the privilege of use of elevator after closing hours of the building provided lessee delegates one person

in its personnel to operate the elevator according to building

rules and provided lessee closes and locks the building after

its use of elevator in a manner requested by lessor. Lessee

agrees to caution its personnel in the operation of the elevator

so that the elevator will not be overloaded and will be operated

with due care and for the building property.;

that from the 28th day of January, 1942 to the 25th day of May,

1942, the plaintiff did carry out its promises and agreements

contained in Exhibits A and B, and the promises and agreements

made to defendant on January 28th, 1942.

"5. That defendant is engaged in the manufacture of

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as to private industry; that as a result of the urgent need of

such materials by governmental agencies and as a direct result

of the freezing of certain of its products for private industry

as of the 2nd day of June, 1942 by United States Government

order, this defendant was operating its business during all 24

hours of the day; that the plaintiff herein know of these facts and conditions, but notwithstanding such knowledge, and contrary



to its promises and assurances contained in the aforesaid lease, dated October 10th, 1941, as aforesaid, and contrary to its promises and assurances made on January 28th, 1942 at the time of the cancellation of said lease as aforesaid, plaintiff did deliberately breach its contract with the intention to injure the business of this defendant, commencing with the 25th day of May, 1942, shut off, at 5 o'clock P.M., daily, its electric current necessary to operate said freight elevator; that as a direct result of this breach of contract by the plaintiff, defendant suffered great damages in its business; that the damages of the defendant caused by such breach of contract by the plaintiff is greatly in excess of the amount of the judgment herein.

"6. That the computation of rent shown in the cognovit filed herein is inaccurate, inasmuch as this defendant did not occupy the premises to and including the 17th day of August, 1942; that the defendant herein vacated said premises on the 13th day of August, 1942.

"7. \* \* \*"

Attached to the affidavit is a photostatic copy of a written lease made by the parties on October 10, 1941, for the premises in question. It contains many provisions, but the affidavit of Bernstein sets up the provision in the rider attached to the said lease, upon which defendant relies. On the last page of the lease of October 10, 1941, appears the following:

"Cancelled by mutual agreement January 28, 1942

"Lessor: General American Life Insurance Company

"By: Baird & Warner, Inc., Agent

"Per: Warner G. Baird, Pres.

"Lessee: North American Manufacturing Company

"By S. Allyn Ward

"President

"Henry Bernstein

"Sec'y Treas."



to its promises and assurances contained in the aforesaid lease, dated October 10th, 1941, as aforesaid, and contrary to its promises and assurances made on January 23rd, 1942 at the time of the cancellation of said lease as aforesaid, plaintiff did deliberately breach its contract with the intention to injure the business of this defendant, commencing with the 25th day of May, 1942, shut off, at 5 o'clock P.M., daily, its electric current necessary to operate said freight elevator; that as a direct result of this breach of contract by the plaintiff, defendant suffered great damages in its business; that the damages of the defendant caused by such breach of contract by the plaintiff is greatly in excess of the amount of the judgment herein.

"6. That the computation of rent shown in the cognovit filed herein is inaccurate, inasmuch as this defendant did not occupy the premises to and including the 17th day of August, 1942; that the defendant herein vacated said premises on the 17th day of August, 1942.

"7. \* \* \*

Attached to the affidavit is a photostatic copy of a written lease made by the parties on October 10, 1941, for the premises in question. It contains many provisions, but the affidavit of Bernstein sets up the provision in the rider attached to the said lease, upon which defendant relies. On the last page of the lease of October 10, 1941, appears the following:

"Cancelled by mutual agreement January 22, 1942  
"Lessor: General American Life Insurance Company  
"By: Baird & Warner, Inc., Agent  
"Per: Warner G. Baird, Pres.  
"Lessee: North American Manufacturing Company  
"By S. Allyn Ward  
"President  
"Henry Bernstein  
"Sec'y Treas."

The rider was cancelled in the same manner as the lease.

Defendant contends that the trial court erred in finding that "the agreement" of January 28, 1942, upon which judgment was confessed, is a lease, and "in finding that any evidence on the rights or privileges of the defendant in and to the use of the elevator contained in said premises would be a contradiction or variance to the terms and provisions of the aforesaid agreement of January 28, 1942." Defendant argues that the said "agreement" could not constitute a lease; that "the only written lease it [defendant] ever had for the premises was that of October 10, 1941, which lease was expressly cancelled by the written agreement of January 28, 1942; that simultaneously with the agreement of January 28, 1942, it was orally discussed between the parties and agreed that until the defendant would vacate said premises the terms and provisions of its occupancy would remain the same as under the aforesaid lease of October 10, 1941;" that "said agreement contains no provision with regard to condition and upkeep of premises; the use or misuse of said premises, right to sublet or assign the same, the use of electricity, water, heating, elevator service, or any of the numerous other terms of occupancy generally contained in leases or specifically contained in the lease between the parties hereto of October 10, 1941."

"No particular words are necessary to create a lease. Whatever is sufficient to show that one party shall divest himself of possession and the other party shall come into it for a determinate time and for a fixed rental amounts to a lease. (Lacey v. Newcomb, 95 Iowa, 287, 63 N. W. 704; Duncklee v. Webber, 151 Mass. 408, 24 N. E. 1082; 24 Cyc. 901.) The evidence shows that the building on the premises covered by this contract was a three-story brick building with basement; that appellant Nathan L. Gordon was a photographer and occupied the first floor of this building with a photograph gallery; that the second and third



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stories were leased to tenants and that the basement was used jointly by appellants and their tenants. It is readily ascertainable from the contract that appellee was to execute a lease to appellants for this storeroom and for that part of the basement not then used by appellants' tenants; that the storeroom was to be used by appellants for a photograph gallery or for a merchandise store; that the term of the lease was to begin on the day the title to the property passed from appellants to appellee and was to end April 30, 1924; that the monthly rental was to be \$125, payable on or before the 10th of each month during the term of the lease, and that appellants, the lessees, should have the right to assign the lease. The above items are all the essential elements of a valid lease. Many other agreements and conditions might be incorporated in a lease, and usually are, but they are not essential to a complete and binding lease. The law of landlord and tenant supplies all the conditions that are not covered by the instrument provided for in this contract of sale." (*Miller v. Gordon*, 296 Ill. 346, 350. (Italics ours.)

It is easy to understand why the many provisions that are usually found in leases and that were contained in the lease of October 10, 1941, are not found in the instrument of January 28, 1942. The term of the lease of October 10, 1941, would not have terminated until April 30, 1943, had that lease not been cancelled by the parties. The instrument of January 28, 1942, fixed a very short term. The United States entered the World War in December, 1941, and from the affidavit of defendant in support of the motion to vacate the judgment it appears that shortly thereafter defendant became engaged in the production of war defense materials for "the United States Army, Navy, Air Corps and other governmental agencies," and that its business expanded until it was compelled to operate "during all 24 hours of the day," and it is a reasonable inference from the entire record that defendant required larger quarters, and as a result of this situation the old lease

able inference from the entire record that defendant required to operate "during all 24 hours of the day," and it is a reasonable inference that its business expanded until it was compelled "the United States Army, Navy, Air Corps and other governmental became engaged in the production of war defense materials for to vacate the judgment it appears that shortly thereafter defendant 1941, and from the affidavit of defendant in support of the motion short term. The United States entered the World War in December, by the parties. The instrument of January 28, 1942, fixed a very terminated until April 30, 1943, had that lease not been cancelled 1942. The term of the lease of October 10, 1941, would not have October 10, 1941, are not found in the instrument of January 28, usually found in leases and that were contained in the lease of It is easy to understand why the many provisions that are III. 346, 350. (Italics ours.)

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was cancelled and the new lease was executed. By the terms of the last lease defendant agreed to surrender possession of the premises to plaintiff on or before February 28, 1942. The short term fixed was undoubtedly considered sufficient to afford defendant a reasonable opportunity to change its place of business. Defendant apparently was unable to move its business by February 28, 1942, and as it then failed to yield up possession of the premises to plaintiff the provision in the last lease, that if it failed to yield up possession it "will pay as liquidated damages for the whole time such possession is withheld, the sum of Fifteen Dollars (\$15.00) per day, but the provisions of this clause shall not be held as a waiver by the General American Life Insurance Company of any right of re-entry," became in force. Defendant seems to base its contention that the instrument of January 28, 1942, was not a valid written lease upon two grounds, (1) that there is no specific description of the premises demised, and (2) that there is no term specified. As to ground (1): Defendant's defense to plaintiff's action is based upon the theory of fact that it continued to occupy after January 28, 1942, the same premises that it occupied under the lease of October 10, 1941. The affidavit specifically states that on January 28, 1942, the parties agreed that defendant would continue to occupy the premises described in the written lease of October 10, 1941. Defendant is in no position to raise ground (1). In Bulkley v. Devine, 127 Ill. 406, the premises there in question were described as being in the city of Chicago, etc., "known and described as follows, to-wit: The house known and numbered as No. \_\_\_\_\_ Thirty-second street." The appellant admitted that he took possession of the house for the rent of which the suit was brought and continued to occupy the same until April 12, 1886, paying rent to his lessor according to the terms of the lease until June 1, 1885, and his entire defense below was founded on the proposition that the lease sued on was void for uncertainty because the number of the house was left blank in the description. In passing upon the point the Supreme



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last lease defendant agreed to surrender possession of the premises  
was cancelled and the new lease was executed. By the terms of the

court said (pp. 409, 410):

"It is somewhat surprising that in the argument little or no importance is attached to the fact that appellant took possession of the house, held the same and paid rent therefor under the lease, the legal effect of which was to remove all uncertainty as to the property intended to be leased, as held in Princeton et al. v. Northern Illinois Railroad Co., 46 Ill. 297. The proposition is self-evident. On the undisputed facts, the defense is self-refuting. Can he, having executed the contract, taken possession under it, held possession and paid rent under it, both to his lessor and appellee, now repudiate that contract because it does not definitely describe the house? Clearly not.

"In this view of the case, the judgment of the Superior Court was the only one which could have been properly entered, and therefore whether the extrinsic parol evidence to aid the lease, or that which was relied upon as showing parol authority to fill the blank number, was properly admitted, is wholly immaterial. \* \* \* Extrinsic proof is always competent to identify the subject matter of a contract, if necessary, and to admit it in no way violates the rule that parol testimony is never admissible to contradict or vary the terms of a written contract. 2 Parsons on Contracts, sec. 550."

We hold that there is no merit in the instant contention of defendant, and we further hold that there is no merit in ground (2), that there is no term specified in the lease.

We hold that the instrument of January 28, 1942, was a valid written lease, and if we are correct in so holding it follows that the contention of defendant that if the instrument in question is not a written lease "then the prayer of the defendant for leave to introduce evidence of its rights to the use of the freight elevator is not contradictory nor a violation of the parol evidence rule," is without merit, as a valid written lease cannot be varied nor contradicted by parol evidence. Defendant calls attention to the fact that the instrument of January 28, 1942, identifies the



court said (pp. 407, 410):

"It is somewhat surprising that in the argument little or no importance is attached to the fact that appellant took possession of the horse, held the same and paid rent therefor under the lease, the legal effect of which was to remove all uncertainty as to the property intended to be leased, as held in Princeton et al. v. Northern Illinois Railroad Co., 46 Ill. 297. The proposition is self-evident. On the undisputed facts, the defense is self-evident. Can he, having executed the contract, take possession under it, hold possession and paid rent under it, both to his lessor and appellee, now repudiate that contract because it does not definitely describe the horse? Clearly not.

"In this view of the case, the judgment of the Superior Court was the only one which could have been properly entered, and therefore whether the extrinsic parole evidence to aid the lease, or that which was relied upon as showing parcel authority to fill the blank number, was properly admitted, is wholly immaterial. \* \* \* Extrinsic proof is always competent to identify the subject matter of a contract, if necessary, and to admit it in no way violates the rule that parole testimony is never admissible to contradict or vary the terms of a written contract. 2 Parsons on Contracts, sec. 750."

We hold that there is no merit in the instant contention of defendant, and we further hold that there is no merit in ground (2), that there is no term specified in the lease. We hold that the instrument of January 28, 1942, was a valid written lease, and if we are correct in so holding it follows that the contention of defendant that if the instrument in question is not a written lease "then the prayer of the defendant for leave to introduce evidence of its rights to the use of the freight elevator is not contradictory nor a violation of the parole evidence rule," is without merit, as a valid written lease cannot be varied nor contradicted by parole evidence. Defendant calls attention to the



premises leased therein as "the premises described in the aforesaid lease dated October 10th, 1941," and argues that as plaintiff had the right to refer to the lease of October 10, 1941, for a description of the premises covered by the lease of January 28, 1942, therefore defendant should be granted the opportunity of showing a breach of one of the terms of the lease of October 10, 1941. Defendant cites no authority in support of this contention. Bulkley v. Devine, supra, 409, 410, answers this argument. Defendant admits, as it must, that the lease of October 10, 1941, was cancelled by the parties. Had the parties so desired, they might have incorporated the entire lease of October 10, 1941, in the instrument of January 28, 1942, or they might have incorporated certain parts of it, but they refer to the original lease for the sole purpose of identifying the premises leased in the instrument of January 28.

Defendant contends that while parol evidence is not admissible to vary or contradict the terms of a written instrument, there is an exception to the rule where the written instrument is uncertain, incomplete, vague or ambiguous, and that the written instrument upon which judgment was confessed "is incomplete, uncertain and ambiguous." If our holding that the lease of January 28, 1942, is a valid written lease is correct, then the instant contention is without merit.

But even if it could be assumed that the instrument executed January 28, 1942, did not constitute a valid written lease, it would avail defendant nothing. The sole defense to plaintiff's action as set up in the affidavit in support of the motion to vacate the judgment is that plaintiff was guilty of constructive eviction. The affidavit alleges that from May 25, 1942, until August 13, 1942, plaintiff "shut off, at 5 o'clock P.M., daily, its electric current necessary to operate said freight elevator; that as a direct result of this breach of contract by the plaintiff, defendant suffered great damages in its business." The affidavit also shows that

premises leased therein as "the premises described in the lease dated October 10th, 1941," and argues that as plaintiff had the right to refer to the lease of October 10, 1941, for a description of the premises covered by the lease of January 28, 1942, therefore defendant should be granted the opportunity of showing a breach of one of the terms of the lease of October 10, 1941. Defendant cites no authority in support of this contention. Bulkeley v. Devine, supra, 409, 410, answers this argument. Defendant admits, as it must, that the lease of October 10, 1941, was incorporated by the parties. Had the parties so desired, they might have incorporated the entire lease of October 10, 1941, in the instrument of January 28, 1942, or they might have incorporated certain parts of it, but they refer to the original lease for the sole purpose of identifying the premises leased in the instrument of January 28, 1942. Defendant contends that while parole evidence is not admissible to vary or contradict the terms of a written instrument, there is an exception to the rule where the written instrument is uncertain, incomplete, vague or ambiguous, and that the written instrument upon which judgment was rendered "is incomplete, uncertain and ambiguous." If our holding that the lease of January 28, 1942, is a valid written lease is correct, then the instant contention is without merit.

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defendant continued to occupy the premises and that it did not vacate same until August 13, 1942. The judgment, as finally amended, awarded plaintiff rent for the period from June 27, 1942, to August 13, 1942. Defendant concedes that it paid no rent for that period.

"The eviction sought to be shown by appellant was constructive. The possession of the premises was retained by the tenant after the alleged acts of eviction. Possession retained after an alleged constructive eviction is a waiver of the right of abandonment. No constructive eviction exists without a surrender of possession. With retention of possession after constructive eviction, liability for rent exists, according to the terms of the lease, during occupancy thereunder. Warren v. Wagner, 75 Ala. 188; DeWitt v. Pierson, 112 Mass. 8; Scott v. Simons, 54 N. H. 426; Boreel v. Lawton, 90 N. Y. 293; Keating v. Springer, supra [146 Ill. 481]." (Barrett v. Boddie, 158 Ill. 479, 484.)

"The next question is, was the defendant below excused from paying rent because of the alleged eviction? There are two kinds of eviction, - actual and constructive. An eviction may be actual, as where there is a physical expulsion; or it may be constructive, which, although an eviction in law, does not deprive the tenant of actual occupancy. (7 Am. & Eng. Ency. of Law, 37.) In 2 Wood on Landlord and Tenant, 1107, it is said: 'Where there is an actual physical eviction from a part of the premises, the tenant may still retain possession of the other part and is absolved from the payment of any rent during the period of its continuance; and herein is the important distinction between an actual and a constructive eviction. The tenant must not only abandon the premises, but it must also appear that he abandoned them on account of the acts of the landlord which are claimed to operate as an eviction; and if his abandonment was due to other causes, in part even, he cannot set up such acts in defense to an action for the rent.'" (Leiferman v. Osten, 167 Ill. 93, 98, 99.)



defendant continued to occupy the premises and that it did not vacate same until August 13, 1942. The judgment, as finally amended, awarded plaintiff rent for the period from June 27, 1942, to August 13, 1942. Defendant concedes that it paid no rent for that period.

"The eviction sought to be shown by appellant was constructive. The possession of the premises was retained by the tenant after the alleged acts of eviction. Possession retained after an alleged constructive eviction is a waiver of the right of abandonment. No constructive eviction exists without a

surrender of possession. With retention of possession after constructive eviction, liability for rent exists, according to the terms of the lease, during occupancy thereunder. Allen v. Harner, 75 Ala. 188; Devitt v. Pierson, 112 Mass. 8; Scott v. Simons, 24 N. H. 426; Borrell v. Lawton, 20 N. Y. 293; Kesling v. Pittman, supra [146 Ill. 431]. (Barrett v. Boldie, 128 Ill. 472, 484.)

"The next question is, was the defendant below excused from paying rent because of the alleged eviction? There are two kinds of eviction, - actual and constructive. An eviction may be actual, as where there is a physical expulsion; or it may be constructive, which, although an eviction in law, does not deprive the tenant of actual occupancy. (7 Am. & Eng. Ency. of Law, 37.) In 2 Wood on Landlord and Tenant, 1107, it is said: 'where there is an actual physical eviction from a part of the premises, the tenant may still retain possession of the other part and its absolved from the payment of any rent during the period of its continuance; and herein is the important distinction between an actual and a constructive eviction. The tenant must not only abandon the premises, but it must also appear that he abandoned them on account of the acts of the landlord which are claimed to operate as an eviction; and if his abandonment was due to other causes, in part even, he cannot set up such acts in defense to an action for the rent.' (Deffenham v. Osteen, 167 Ill. 92, 93.)

"Not every act of a landlord in violation of his covenants or of the tenant's enjoyment of the premises under the lease will amount to a constructive eviction. Some acts of interference may be mere acts of trespass to which the term 'eviction' is not applicable. To constitute an eviction there must be something of a grave and permanent character done by the landlord clearly indicating the intention of the landlord to deprive the tenant of the longer beneficial enjoyment of the premises in accordance with the terms of the lease. (Hayner v. Smith, <sup>[63 Ill. 430]</sup> supra / Barrett v. Boddie, 158 Ill. 479; Keating v. Springer, 146 id. 481; Leiferman v. Osten, 167 id. 93.) The failure of a landlord to furnish heat for the demised premises in accordance with the terms of his covenant in the lease justifies the tenant in removing from the premises, and if he does so he is discharged from the payment of rent thereafter. (Giddings v. Williams, 336 Ill. 482.) These facts constitute a constructive eviction. There can be no constructive eviction, however, without the vacating of the premises. Where a tenant fails to surrender possession after the landlord's commission of acts justifying the abandonment of the premises the liability for rent will continue so long as possession of the premises is continued. (Chicago Legal News Co. v. Browne, 103 Ill. 317; Keating v. Springer, supra; Barrett v. Boddie, supra; Leiferman v. Osten, supra.)" (Auto. Sup. Co. v. Scene-in-Action Corp., 340 Ill. 196, 201, 202. See, also, Harmony Cafeteria Co. v. International Supply Co., 249 Ill. App. 532, 538.)

We have carefully and patiently considered the contentions raised by defendant, but we see no good reason for disturbing the instant judgment. The judgment of the Circuit court of Cook county is therefore affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.



"Not every act of a landlord in violation of his covenants or of the tenant's enjoyment of the premises under the lease will amount to a constructive eviction. Some acts of interference may be mere acts of trespass to which the term 'eviction' is not applicable. To constitute an eviction there must be something of a grave and permanent character done by the landlord clearly indicating the intention of the landlord to deprive the tenant of the longer beneficial enjoyment of the premises in accordance with the terms of the lease. (Havner v. Smith, 221 Ill. 430; [63 Ill. 430]; 128 Ill. 479; Keating v. Springer, 146 Ill. 481; Lefkowitz v. Gaten, 167 Ill. 93.) The failure of a landlord to furnish heat for the demised premises in accordance with the terms of his covenant in the lease justifies the tenant in removing from the premises, and if he does so he is discharged from the payment of rent thereafter. (Giddings v. Williams, 336 Ill. 482.) These facts constitute a constructive eviction. There can be no constructive eviction, however, without the vacating of the premises. Where a tenant fails to surrender possession after the landlord's commission of acts justifying the abandonment of the premises the landlord's obligation to rent will continue so long as possession of the premises is continued. (Chicago Real Estate Co. v. Brown, 103 Ill. 317; Keating v. Springer, supra; Barrett v. Boddie, supra; Lefkowitz v. Gaten, supra.)" (Auto. Sup. Co. v. Scene-in-Action Corp., 340 Ill. 196, 201, 202. See, also, Harmony Cafeteria Co. v. International Supply Co., 249 Ill. App. 332, 338.)

We have carefully and patiently considered the contentions raised by defendant, but we see no good reason for disturbing the instant judgment. The judgment of the Circuit Court of Cook County is therefore affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.



42648

320 I.A. 489'

ELMER E. SCHMOLDT,  
Appellant,

v.

CHICAGO STONE SETTING CO.,  
a corporation, J. F. STEFAN  
and OLE JENSEN,  
Appellees.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action upon a promissory note, dated January 2, 1938, in the sum of \$2,500, due on demand, signed by defendant Chicago Stone Setting Company, a corporation, and indorsed in blank by J. F. Stefan and Ole Jensen, defendants. The cause was tried by the court, without a jury, there was a finding in favor of defendants, and plaintiff appeals from the judgment entered upon the finding.

This was the second trial of the cause. Upon the first trial there was a finding and judgment in plaintiff's favor for \$2,755 against all of the defendants. The defendants appealed and in this court the judgment was reversed and the cause was remanded (Schmoldt v. Chicago Stone Setting Co. et al., 309 Ill. App. 377). In their answer defendants denied that plaintiff was an innocent holder in due course for value and averred that he had not paid anything of value for the note but was merely acting as agent of the payee, Schulz; that plaintiff acquired the note after it was overdue and knew that there was no consideration for the note. In the first trial, the court refused to permit defendants to introduce evidence in support of their defense, and this court held that such action constituted reversible error and the judgment was reversed and the cause remanded. The opinion states the pleadings in the cause and it is unnecessary for us to again repeat them.

Plaintiff contends that the trial court erred in refusing to admit proper and material evidence offered by him. The conten-

3201A-33

AMERICAN TRUST COMPANY  
COUNTY OF COOK COUNTY

CHICAGO STONE SETTING CO.  
a corporation  
and OLE JENSEN  
defendants.

THE JUDGE, SCHEMKE, DELIVERED THE OPINION OF THE COURT.  
Plaintiff brought an action upon a promissory note,  
dated January 2, 1930, in the sum of \$2,000, one on demand,  
signed by defendant Chicago Stone Setting Company, a cor-  
poration, and endorsed in blank by L. E. Jensen and Ole Jensen,  
defendants. The case was tried by the court, without a jury,  
there was a finding in favor of defendants, and plaintiff  
appeals from the judgment entered upon the finding.

This was the second trial of the cause. Upon the first  
trial there was a finding and judgment in plaintiff's favor for  
\$2,775 against all of the defendants. The defendants appealed  
and in this court the judgment was reversed and the cause was  
remanded (Chicago Stone Setting Co. et al., 300

Ill. App. 197). In their answer defendants denied that plain-  
tiff was an innocent holder in due course for value and averred  
that he had not paid anything of value for the note but was merely  
acting as agent of the payee, Scheemke; that plaintiff admitted  
the note after it was overdue and knew that there was no consid-  
eration for the note. In the first trial, the court refused to

permit defendants to introduce evidence in support of their  
defense, and this court held that such action constituted reversible  
error and the judgment was reversed and the cause remanded. The  
opinion states the pleadings in the case and it is unnecessary  
for us to repeat them.

Plaintiff contends that the trial court erred in refusing  
to admit proper and material evidence offered by him. The court-



tion is so clearly a meritorious one that it is surprising that defendants have not confessed error. The theory of fact of plaintiff was that he purchased the note from Joseph R. Schulz, the payee of the note, and that he was a holder in due course; that Schulz was employed by Chicago Stone Setting Company, defendant, as an auditor and that he worked for that company from 1926 to January 1, 1938; that his pay for such services was fixed at \$300 per year and that he was paid on that basis from 1926 to 1929; that he received no compensation for his services for the years 1930 to 1937, both inclusive, and that the note was given in payment of his services up to January 1, 1938. Plaintiff testified that he purchased the note from Schulz and paid him \$500 for it. For the defense, Joseph F. Stefan, defendant, an officer and director of Chicago Stone Setting Company, testified that Schulz was employed at the inception of the business of said company in 1926; that his pay was fixed at \$300 a year but that the company stopped paying Schulz \$300 a year in 1930; that at that time he told Schulz that "the assets at the present time were not big enough to pay him that much [\$300], and business wasn't big enough," and that Schulz agreed to work for \$25 a year. The witness gave testimony tending to show that a girl employed by defendant company made the entries in the "Journal, Day Book and so on;" that Schulz came to the office of defendant company only one evening a year, at which time he went over its books; that Schulz was paid in full for his services at the rate of \$25 a year. Stefan's evidence was introduced for the purpose of proving that there was no consideration for the note. In rebuttal of Stefan's testimony plaintiff offered in evidence certain parts of the original journal and ledger<sup>of</sup> defendant company, which were before the court. The journal showed that Schulz was credited with \$300 yearly for auditing the books during the years 1930 to 1937, both inclusive. The ledger showed like credits, and both books showed that no payments had been made to Schulz on account of his services during



tion is so clearly a meritorious one that it is unnecessary that  
defendants have not confessed error. The theory of fact of  
plaintiff was that he purchased the note from Joseph W. Stefan,  
the owner of the note, and that he was a holder in due course;  
that Stefan was employed by Chicago Stone Setting Company, defendant,  
and as an auditor and that he worked for that company from 1926  
to January 1, 1938; that his pay for such services was fixed at  
\$300 per year and that he was paid on that basis from 1926 to  
1929; that he received no compensation for his services for the  
years 1930 to 1937, both inclusive, and that the note was given  
in payment of his services up to January 1, 1938. Plaintiff testi-  
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enough to pay him that much [\$300], and business wasn't big  
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ness gave testimony tending to show that a girl employed by defend-  
ant company made the entries in the "Journal, Key Book and so on;"  
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a year, at which time he went over its books; that Stefan was paid  
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consideration for the note. In rebuttal of Stefan's testimony  
plaintiff offered in evidence certain parts of the original Journal  
and Ledger of defendant company, which were before the court. The  
Journal showed that Stefan was credited with \$300 yearly for  
auditing the books during the years 1930 to 1937, both inclusive.  
The ledger showed like credits, and both books showed that he

the period in question. Counsel for defendants objected to the introduction of the evidence on the ground that it was not rebuttal evidence, and the trial court sustained the objection upon that ground. It would seem hardly necessary to state that the trial court erred in so ruling. Stefan's evidence was important, as it tended to prove that there was no consideration for the note and it introduced a new theory of fact as to the terms of the employment of Schulz. Plaintiff had the right to rebut Stefan's evidence, and the books of defendant company certainly tended to rebut that evidence. Defendants argue that the admission of evidence in rebuttal is always a matter of discretion of the trial judge and is not subject to review except in cases of gross abuse. That principle of law is only applicable where the rebuttal evidence was properly a part of plaintiff's main case. Washington Ice Co. v. Bradley, 171 Ill. 255, 259, cited by defendants in support of their contention, states the correct rule. In the instant case plaintiff made out a prima facie case by offering the note in evidence.

Defendants seek to avoid the effect of the error by arguing that the entries in the books of defendant company were no better evidence than Schulz's oral testimony, because Schulz, as the auditor of defendant company, is chargeable with the entries and therefore defendant company cannot be bound by them; that Schulz was allowed to testify as to the terms of his employment and that the entries in the books would add nothing to his oral testimony. This argument does not require an answer.

Defendants argue, with some force, that certain evidence would justify the trial court in finding that plaintiff acquired the note "under the most peculiar and suspicious circumstances" and that he never paid anything for the note and was used as a "dummy" for Schulz in the instant proceedings, and they contend that because of the suspicious nature of plaintiff's claim the judgment should be affirmed. It is a sufficient answer to this



the period in question. Counsel for defendants insisted on the introduction of the evidence on the ground that it was not rebuttal evidence, and the trial court sustained the objection upon that point. It would seem hardly necessary to state that the trial court erred in so ruling. Stefan's evidence was important, as it tended to prove that there was no communication for the note and it introduced a new theory of fact as to the terms of the employment of Stefan. Again it had the right to rebut Stefan's evidence, and the books of defendant company certainly tended to rebut that evidence. Defendants argue that the admission of evidence in rebuttal is always a matter of discretion of the trial judge and is not subject to review except in cases of gross abuse. That principle of law is only applicable where the rebuttal evidence was properly a part of plaintiff's case. Washington Ice Co. v. Bailey, 171 Ill. 252, 259, cited by defendants in support of their contention, states the correct rule. In the instant case plaintiff made out a true case by offering the note in evidence. Defendants seek to avoid the effect of the error by arguing that the entries in the books of defendant company were no better evidence than Stefan's oral testimony, because Stefan, as the author of defendant company, is chargeable with the entries and therefore defendant company cannot be bound by them; that Stefan was allowed to testify as to the terms of his employment and that the entries in the books would aid relating to his oral testimony. This argument does not require an answer. Defendants argue, with some force, that certain evidence would justify the trial court in finding that plaintiff secured the note "under the most peculiar and suspicious circumstances" and that he never paid anything for the note and was asked as a "dummy" for Stefan in the instant proceedings, and they contend that because of the suspicious nature of plaintiff's claim the judgment should be affirmed. It is a sufficient answer to this



argument and contention to say that if defendants had confidence that their defense was manifestly a just one, they should not have objected to the introduction of evidence that was clearly competent and material to plaintiff's case.

It is regrettable that we are forced to reverse the judgment in this case and remand the cause for a third trial, but defendants have themselves to blame for our action.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE  
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

argument and contention to say that if defendants had committed  
that their defense as constituted by a jury and, they should not have  
objected to the introduction of evidence that was clearly competent  
and material to plaintiff's case.

It is regrettable that we are forced to reverse the judg-  
ment in this case and award the case for a third trial, but  
defendants have themselves to blame for our action.  
The judgment of the Superior Court of Cook County is  
reversed and the case is remanded for a new trial.

THOMAS J. BRADY, JUDGE  
RECEIVED AT A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

42694

320 I.A. 139<sup>2</sup>

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

ERNEST GRUHL,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An information was filed against defendant charging him with the offense of contributing to the delinquency of a child. Defendant plead not guilty, waived a jury trial and submitted the cause to the trial court. Defendant was found guilty of the charge and sentenced to the house of correction for one year. He sues out this writ of error.

Counsel for defendant states that the common law record is sufficient to make the points on which he relies to secure a reversal of the judgment.

The verified information that was filed in the cause charges that defendant "on the 31st day of October, A. D. 1942, at the City of Chicago, aforesaid, did unlawfully, knowingly and wilfully encourage Judith Nolan a female person under the age of 18 years to-wit: 3 years of age to be or to become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to conditions which tended to render said Judith Nolan to be or to become a delinquent child in that he, the said Ernest Gruhl did then and there take the said Judith Nolan into a gangway at 5152 Fulton Street, where he gave her a penny and had her lower her panties, and then exposed himself. In Violation of - Section 2, Paragraph 104, Chapter 38 contrary to the form of the Statute \* \* \*." The common law record also shows the following:

"Now come the people by the State's Attorney and the defendant as well in his own proper person, and said defendant being duly arraigned and forthwith demanded of and concerning



320 I.A. 189

PEOPLE OF THE STATE OF ILLINOIS  
Defendant in Error,

ERROR TO UNITED STATES COURT

OF CHICAGO.

ERNEST GRUHL,  
Plaintiff in Error.

AND JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

In information was filed against defendant charging him with the offense of contributing to the delinquency of a child. Defendant plead not guilty, waived a jury trial and admitted the cause to the trial court. Defendant was found guilty of the charge and sentenced to the house of correction for one year. He sues out this writ of error.

Counsel for defendant states that the common law record is sufficient to make the points on which he relies to secure a reversal of the judgment.

The verified information that was filed in the cause charges that defendant "on the 1st day of October, A. D. 1945, at the City of Chicago, aforesaid, did unlawfully, knowingly and willfully encourage Judith Nolan a female person under the age of 18 years to-wit: 3 years of age to be or to become a delinquent child and did then and there unlawfully, knowingly and willfully do acts which directly produced, promoted and contributed to conditions which tended to render said Judith Nolan to be or to become a delinquent child in that he, the said Ernest Gruhl did then and there take the said Judith Nolan into a gangway at 2122 Walton Street, where he gave her a penny and had her lower her panties, and then exposed himself. In Violation of - Section 2, Paragraph 104, Chapter 38 centenary to the form of the Statute \* \* \*". The common law record also shows the following:

"Now come the people by the State's Attorney and the defendant as well in his own proper person, and said defendant

the charge alleged against him in the information herein how he will acquit himself thereof for a plea in that behalf says that he is not guilty in manner and form as charged in said information.

"Said defendant being duly advised by the Court as to his right to a trial by jury in this cause, elects to waive a trial by jury, and this cause is, by agreement in open Court between the parties hereto, submitted to the Court for trial without a jury.

"The people being now here represented by the State's Attorney and said defendant being present in his own proper person and the trial of this cause is now here entered upon before the Court without a jury, and the Court, after hearing all the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, renders the following finding, to-wit:

"The court finds the defendant guilty in manner and form as charged in the information herein. Wherefore it is ordered that the same be entered of record herein.'

"Application for probation set for November 27th, 1942, To be examined by Dr. Haines."

. "Application for probation overruled."

"The State's Attorney now here moves the Court for final judgment on the finding of guilty herein, said people being represented here by the State's Attorney and said defendant being present in his own proper person and not saying anything further why the judgment of the court should not now be pronounced against him on the finding of guilty entered in this cause, the court finds that it has jurisdiction of the subject matter of this cause and of the parties hereto, and it is considered and adjudged by the court that said defendant is guilty of the criminal offense of Contributing To Delinquency Of Child on said finding of guilty.

"\* \* \* it is considered, ordered and adjudged that said defendant because of said judgment of guilty, be and he is hereby

The charge alleged against him in the information is that he will acquit himself thereof for a plea in the trial. The fact he is not guilty in manner and form as charged in this information. "Said defendant being duly advised by the Court as to his

right to a trial by jury in this case, elects to waive a trial by jury, and this cause is, by agreement in open Court between the parties hereto, submitted to the Court for trial without a jury.

"The people being now here represented by the State's Attorney and said defendant being present in his own proper person and the trial of this cause is now here entered upon before the Court without a jury, and the Court, after hearing all the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, renders the following finding, to-wit: "The court finds the defendant guilty in manner and form as charged in the information herein. Therefore it is ordered

that the same be entered of record herein. "Application for probation set for November 27th, 1901,

To be examined by Dr. Haines."

"Application for probation overruled."

"The State's Attorney now moves the Court for final judgment on the finding of guilty herein, said motion being represented here by the State's Attorney and said defendant being present in his own proper person and not saying anything further why the judgment of the Court should not now be pronounced against him on the finding of guilty entered in this case, the Court finds that it has jurisdiction of the subject matter of this case and of the parties hereto, and it is considered and adjudged by the Court that said defendant is guilty of the criminal offense of contributing to delinquency of child as said finding of guilty.

"It is considered, ordered and adjudged that said defendant because of said finding of guilty, be and he is hereby



sentenced to confinement at labor in said House of Correction of the City of Chicago in the County of Cook and State of Illinois, for the term of One (1) year from and after the delivery of the body of said defendant to the Superintendent of said House of Correction. \* \* \*."

Defendant first contends that the record fails to show affirmatively that defendant was represented by counsel in the trial of the cause, and that "it is essential to the validity of a judgment in every criminal case that the defendant be represented by counsel, without which the court has no jurisdiction to proceed to trial, and without counsel 'the court loses jurisdiction in the course of the proceedings.'" The People contend that the record fails to show that defendant made any request of the trial court to provide him with counsel and that therefore the instant contention of defendant is without merit. In People v. Parcora, 358 Ill. 448, the opinion calls attention to the fact that the affidavits filed in support of the defendant's prayer to have the judgment of the court against him vacated did not indicate that the defendant asked for and was denied the benefit of counsel. The opinion states (p. 451):

"The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants unable to procure such assistance. It is a matter of common knowledge that in a court such as the municipal court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing this case in the municipal court did not deny a request for the services of counsel."

We hold that there is no merit in the instant contention.

There is no merit in defendant's contention that there is no finding by the trial court that by the doing of the particular acts specified in the information defendant contributed to the delinquency

sentenced to confinement at labor in said House of Correction of the City of Chicago in the County of Cook and State of Illinois, for the term of One (1) year from and after the delivery of the body of said defendant to the House of Correction.

" \* \* "

Defendant first contends that the record fails to show affirmatively that defendant was represented by counsel in the trial of the case, and that "it is essential to the validity

of a judgment in every criminal case that the defendant be represented by counsel, without which the court has no jurisdiction to proceed to trial, and without counsel the court loses jurisdiction in the course of the proceedings." The People contend that the record fails to show that defendant made any request of the trial court to provide him with counsel and that therefore the instant contention of defendant is without merit. In *People v. Rogers*, 358 Ill. 448, the opinion calls attention to the fact that the defendant filed in support of the defendant's prayer to have the judgment of the court against him vacated did not indicate that the defendant asked for and was denied the benefit of counsel. The opinion states (p. 451):

"The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants unable to procure such assistance. It is a matter of common knowledge that in a court such as the Municipal Court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing this case in the Municipal Court did not deny a request for the services of counsel."

We hold that there is no merit in the instant contention. There is no merit in defendant's contention that there is no finding by the trial court that by the doing of the particular acts specified in the information defendant contributed to the delinquency



of the child named in the information. The trial court found that defendant was guilty in manner and form as charged in the information. This was a sufficient finding. (See People v. Lee, 237 Ill. 272, 275, 276, and cases cited therein.)

Defendant further contends that there was no finding by the trial court that the child became a delinquent as the result of the acts alleged to have been committed by defendant; that it would be preposterous to hold that a child of three years of age could become a delinquent. There is no merit in this contention. In People v. Klyczek, 307 Ill. 150, the court states (pp. 156, 157):

"It is argued on behalf of the plaintiff in error that a defendant could not be convicted of contributing to the delinquency of a child unless it was proved beyond a reasonable doubt either that the child was delinquent or became delinquent by virtue of the defendant's acts. Section I of the statute of June 25, 1915, (which is paragraph 42<sup>hm</sup> of the Criminal Code,) defines the term 'delinquent child,' and section 2 (which is paragraph 42<sup>hm</sup> of the Criminal Code) provides that any person who shall knowingly or willfully do acts which directly tend to render any such child so delinquent shall be deemed guilty of the crime of contributing to the delinquency of children. It is not necessary that the child who is the subject of the crime should be a delinquent child or should become a delinquent child. The crime is complete when acts are committed which directly tend to render the child delinquent."

Defendant contends that the information fails to charge the offense of contributing to the delinquency of a child. This contention, feebly urged, scarcely merits consideration. The acts that the information charges defendant with having committed are clearly acts which would directly tend to render the child delinquent.



of the child named in the information. The trial court found that defendant was guilty in manner and form as charged in the information. This was a sufficient finding. (See People v. Lee, 237 Ill. 272, 273, and cases cited therein.)

Defendant further contends that there was no finding by the trial court that the child became a delinquent as the result of the acts alleged to have been committed by defendant; that it would be preposterous to hold that a child of three years of age could become a delinquent. There is no merit in this contention. In People v. Kivner, 307 Ill. 126, the court so held. (Pr. 156, 157.)

"It is argued on behalf of the plaintiff in error that

a defendant could not be convicted of contributing to the delinquency of a child unless it was proved beyond a reasonable doubt either that the child was delinquent or became delinquent by virtue of the defendant's acts. Section 1 of the statute of June 27, 1915, (which is paragraph 436 of the Criminal Code), defines the term 'delinquent child,' and section 2 (which is paragraph 437 of the Criminal Code) provides that any person who shall knowingly or willfully do acts which directly tend to render any such child so delinquent shall be deemed guilty of the crime of contributing to the delinquency of children. It is not necessary that the child who is the subject of the crime should be a delinquent child or should become a delinquent child. The crime is complete when acts are committed which directly tend to render the child delinquent."

Defendant contends that the information fails to charge the offense of contributing to the delinquency of a child. This contention, freely made, scarcely merits consideration. The acts that the information charges defendant with having committed are clearly acts which would directly tend to render the child delinquent.

There is no merit in this writ of error and the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

There is no writ in aid of error and the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

FRANK, J., and GALLIVAN, J., concur.



42620

HOWARD F. BISHOP,

Appellee,

v.

GEORGE J. NIKOLAS, SR., et al.

On Appeal of GEORGE J. NIKOLAS, SR.,

Appellant.

320 I.A. 681

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

131

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 26, 1939 Howard F. Bishop, an attorney-at-law, filed a complaint in two counts in the Circuit Court of Cook County against George J. Nikolas, Sr., and 3206 Ainslie Street Building Corporation. The first count, directed against George J. Nikolas, Sr., alleged that on or about September 15, 1935 defendant employed plaintiff to represent him in the matter of a proposed reorganization of the Ainslie-Kedzie Building Corporation; that defendant was then the owner of a large number of bonds secured by a first trust deed on the premises; that there was an outstanding principal balance of \$166,500.00 on the bonds, of which defendant owned in excess of 75%; that the building corporation, prior to October 3, 1935, filed its petition for reorganization of the mortgage structure under Section 77-B of the Bankruptcy Act; that defendant directed the plaintiff to resist the proceedings and to endeavor to have them dismissed; that at defendant's request plaintiff filed an intervening petition in the Federal Court on behalf of a special bondholders' committee, attended various court hearings, examined documents, filed its objections to the plan of reorganization, appeared before a Federal Master in Chancery in the hearings, represented Nikolas in connection therewith until the plan was abandoned and the petition in the Federal Court dismissed; that from on or about August 1, 1934

HOWARD F. BISHOP

3201.A.681

APPEAL FROM

Appellee

v.

GEORGE J. NIKOLAS, JR., et al.

CIRCUIT COURT

COOK COUNTY

ON APPEAL OF GEORGE J. NIKOLAS, JR.,

Appellant.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 28, 1938 Howard F. Bishop, an attorney-at-law,

filed a complaint in two counts in the Circuit Court of Cook County against George J. Nicholas, Sr., and 3208 Alameda Street Building

Corporation. The first count, directed against George J. Nicholas,

Sr., alleged that on or about September 12, 1935 defendant employed

plaintiff to represent him in the matter of a proposed reorganization

of the Alameda-Kedzie Building Corporation; that defendant was then

the owner of a large number of bonds secured by a first trust deed

on the premises; that there was an outstanding principal balance

of \$166,500.00 on the bonds, of which defendant owned in excess of

75%; that the building corporation, prior to October 5, 1935, filed

its petition for reorganization of the mortgage structure under

Section 77-B of the Bankruptcy Act; that defendant directed the

plaintiff to resist the proceedings and to endeavor to have them

dismissed; that at defendant's request plaintiff filed an intervening

petition in the Federal Court on behalf of a special bondholders'

committee, attended various court hearings, examined documents, filed

its objections to the plan of reorganization, appeared before a

Federal Master in Chancery in the hearings, represented Nicholas in

connection therewith until the plan was abandoned and the petition

in the Federal Court dismissed; that from on or about August 1, 1934



to January 1, 1936 defendant hired, employed and consulted plaintiff in connection with bond issues on various buildings, namely, Lincoln Montrose Apartments, Montana Apartments, Olive Apartments, Sherwin Apartments, Ainslie Block, Seymour Apartments, Wilson Robey Apartments and Kenmore Mansions; that defendant had an interest in these buildings, or he, his children or other relatives owned bonds secured by trust deeds on these buildings; that plaintiff advised and conferred with defendant in connection with his personal interest and holdings and in connection with the interest of the members of his family as to these buildings; that plaintiff spent a great deal of time in such conferences; that defendant became liable for the fair and reasonable value of the services rendered by plaintiff; and plaintiff asked judgment for \$5,000.00. The second count, directed against the 3206 Ainslie Street Building Corporation, alleged that the bond issue on the premises was reorganized; that the new corporation was chartered; that the new corporation "adopted" the services rendered by plaintiff to pay therefor; and plaintiff asked judgment against defendant corporation. Answering, defendants denied that they or either of them hired plaintiff, or that he performed any services for them or either of them. They admitted that the old building corporation filed a petition for reorganization under Section 77-B of the Bankruptcy Act; and denied that they or either of them directed plaintiff to resist the reorganization proceedings or to perform any services for them or either of them. Defendant Nikolas denied that he consulted plaintiff, sought his advice or requested plaintiff to render any services for him as to any of the buildings listed in the complaint; and defendants denied that plaintiff was entitled to a judgment. The case was tried before the court and a jury. At the close of plaintiff's case a motion for a directed verdict finding the issues for the building corporation was granted. The jury returned a verdict for plaintiff and against George J. Nikolas, Sr., assessing damages at \$3,500.00. A motion for a new trial was overruled and judgment was entered on the verdict, to reverse which



to January 1, 1936 defendant hired, employed and conspired plaintiff in connection with bond issues on various buildings, namely, Lincoln Montrose Apartments, Westside Apartments, Olive Apartments, certain Apartments, Alhambra Block, Bayview Apartments, Wilson Boy Apartments and Kennel Mansions; that defendant had an interest in these buildings, or he, his children or other relatives owned bonds secured by trust deeds on these buildings; that plaintiff advised and conferred with defendant in connection with his personal interest and holdings and in connection with the interest of the members of his family in to these buildings; that plaintiff spent a great deal of time in such conference; that defendant became liable for the tax and reasonable value of the services rendered by plaintiff; and plaintiff asked judgment for \$5,000.00. The second count, directed against the 3208 Alhambra Street Building Corporation, alleged that the bond issue on the premises was reorganized; that the new corporation was chartered; that the new corporation "adopted" the services rendered by plaintiff to pay therefor; and plaintiff asked judgment against defendant corporation. Answering, defendant denied that they or either of them hired plaintiff, or that he performed any services for them or either of them. They admitted that the old building corporation filed a petition for reorganization under Section 77-B of the Bankruptcy Act; and denied that they or either of them directed plaintiff to resist the reorganization proceedings or to perform any services for them or either of them. Defendant Nicholas denied that he consulted plaintiff, sought his advice or requested plaintiff to render any services for him as to any of the buildings listed in the complaint; and defendant denied that plaintiff was entitled to a judgment. The case was tried before the court and a jury. At the close of plaintiff's case a motion for a directed verdict finding the issues for the building corporation was granted. The jury returned a verdict for plaintiff and against George J. Nicholas, Jr., assessing damages at \$5,000.00. A motion for a new trial was overruled and judgment was entered on the verdict, to reverse which

this appeal is prosecuted.

Plaintiff's theory of the case is that he, a practicing lawyer of Chicago for more than thirty years, was retained by the defendant to represent his interests in the matter of a proposed reorganization of the Ainslie Kedzie Building Corporation, and also in the matter of a proposed reorganization of eight corporations, in which defendant and members of his family held substantial amounts of defaulted bonds; that in pursuance of the oral agreement plaintiff performed various and valuable services for defendant in the United States District Court and had many consultations on numerous bond issues in which defendant and members of his family had substantial interests, such services extending from about August, 1934 to January, 1936; and that plaintiff is entitled to recover the fair and reasonable value of such services. Defendant's theory of the case is that "he never retained the plaintiff to represent him or anyone else in any matter at any time; that he never requested the plaintiff to take any action taken by him; that he never consulted the plaintiff on any of the defendant's affairs and never agreed to pay him anything; that such services as were rendered by the plaintiff in connection with the reorganization proceeding of the Ainslie Kedzie Building Corporation were rendered by the plaintiff as attorney for a bondholders' committee, acting in a representative capacity for and on behalf of a large number of bondholders, of which the defendant was a small bondholder and the plaintiff himself a large bondholder, and of which bondholders' committee the defendant was chosen as a member along with the plaintiff, who was also a member and who was chairman of the committee, and that the defendant never agreed to become and never became personally liable for any services that were rendered by the plaintiff. The defendant further contended with respect to the services alleged other than the services rendered in the reorganization proceeding, that no agreement ever existed and that no such services were ever rendered."



this appeal is prosecuted.

Plaintiff's theory of the case is that he, a practicing lawyer of Chicago for more than thirty years, was retained by the defendant to represent his interests in the matter of a proposed reorganization of the Annie Kegel Building Corporation, and also in the matter of a proposed reorganization of eight corporations, in which defendant and members of his family held substantial amounts of debentured bonds; that in pursuance of the oral agreement plaintiff performed various and valuable services for defendant in the United States District Court and had many consultations on numerous bond issues in which defendant and members of his family had substantial interests, such services extending from about August, 1934 to January, 1935; and that plaintiff is entitled to recover the fair and reasonable value of such services. Defendant's theory of the case is that "he never retained the plaintiff to represent him or anyone else in any matter at any time; that he never requested the plaintiff to take any action taken by him; that he never consulted the plaintiff on any of the defendant's affairs and never agreed to pay him anything; that such services as were rendered by the plaintiff in connection with the reorganization proceeding of the Annie Kegel Building Corporation were rendered by the plaintiff as attorney for a bondholders' committee, acting in a representative capacity for and on behalf of a large number of bondholders, of which the defendant was a small bondholder, and the plaintiff himself a large bondholder, and of which bondholders' committee the defendant was chosen as a member along with the plaintiff, who was also a member and who was chairman of the committee, and that the defendant never agreed to become and never became personally liable for any services that were rendered by the plaintiff. The defendant further contended with respect to the services alleged other than the services rendered in the reorganization proceeding, that no agreement ever existed and that no such services were ever rendered."



Defendant, relying on the well established rule that the party holding the affirmative is required to prove his case by a preponderance of all the evidence and that if the evidence does not preponderate in his favor or is evenly balanced the judgment must be reversed, argues that in the instant case plaintiff failed so to prove his case and that hence the judgment should be reversed and the cause remanded for a new trial with appropriate directions. Defendant states that where two witnesses standing before the court, equal in character, equal in interest and equal in opportunity to know the facts, have made irreconcilable contradictory statements and neither is corroborated, then there is no preponderance and the party relying on one of such witnesses whose burden it was to go forward, has failed to sustain his burden; that where two witnesses have made irreconcilable, contradictory statements, every item of evidence contained in the record which fairly tends to corroborate or to contradict either of them should be considered in determining preponderance; that where in the case of contradictory statements of two witnesses there is inherent evidence of truth in one and the other statement is unreasonable or carries with it the element of doubt or suspicion of its sincerity, the latter statement is entitled to little credence and the clear preponderance is with the former statement; and that where a verdict is manifestly against the weight of the evidence, it is the duty of the trial judge to set it aside and grant a new trial, and if he fails to do so, his failure constitutes error for which the judgment must be reversed. Broughton v. Smart, 59 Ill. 440, 442; Lawrence v. Smart, 16 Ill. App. 489; Brady v. Chaffee, 163 Ill. App. 242; People v. Pfuhl, 275 Ill. 243; Donelson v. East St. Louis & Suburban Ry. Co., 235 Ill. 626; Lincoln v. Stowell, 62 Ill. 84. The law, as stated by plaintiff, is supported by the authorities. We recognize that the credibility of the witnesses, the weight of the testimony and the inferences to be drawn from the





facts proved, are all questions for the jury and not for the court to decide; that it is only where the verdict is so manifestly against the weight of the evidence as to make it apparent to the court that the verdict was not the result of the impartial and honest judgment of the jury, that a court is warranted in setting aside the verdict and awarding a new trial on the ground that the verdict is against the weight of the evidence; and that great weight is given to the verdicts of juries and they will not be disturbed by courts of appellate jurisdiction unless contrary to the decided weight of the evidence. People v. Howe, 375 Ill. 130; Franko v. Grosby, 278 Ill. App. 416; Russell v. Richardson, 302 Ill. App. 589; People v. Thompson, 321 Ill. 594. With these rules as guides, we turn to the record to determine whether the judgment is manifestly against the weight of the evidence.

The real estate about which most of the testimony was introduced is located at the northwest corner of Ainslie Street and Kedzie Avenue, Chicago, having a frontage of 98 feet on Kedzie Avenue and running to a depth of 125 feet on Ainslie Street. It is improved with a three and four story and English basement building of pressed brick and stone trim front and sides, containing 69 single hotel rooms, each with a bath, 20 kitchenette furnished apartments, two of three rooms, four of two rooms and 14 of 1½ room apartments, each apartment with a bath. On the ground floor is a lobby and a lounge 24 x 28 feet. There are seven stores facing on Kedzie Avenue. Title to the real estate was in the Ainslie Kedzie Building Corporation. The building is commonly known as the Ainslie Block. A bond issue was outstanding, secured by a trust deed to Heitman Trust Company, as trustee. Plaintiff and defendant were directors of the trust company. In 1933 the face value of the bonds outstanding under the first trust deed was \$166,500. The owner defaulted in the payment of principal, interest and taxes, and on July 25, 1933 the Heitman Trust Company,

*that is, verdict is manifestly against the weight of the evidence*



facts proved, and all questions for the jury and not for the court

to decide; that it is only where the verdict is manifestly against

the weight of the evidence as to make it important to the court that

the verdict was not the result of the impartial and honest judgment

of the jury, that a court is warranted in setting aside the verdict

and awarding a new trial on the ground that the verdict is against

the weight of the evidence; and that great weight is given to the

verdict of juries and they will not be disturbed by courts of

appeals jurisdiction unless contrary to the decided weight of the

evidence. People v. Davis, 273 Ill. 130; People v. Kelly, 278 Ill.

App. 418; Russell v. Richardson, 302 Ill. App. 289; People v.

Thompson, 321 Ill. 284. With these rules as guides, we turn to the

record to determine whether the judgment is manifestly against the

weight of the evidence.

The real estate about which most of the testimony was intro-

duced is located at the northwest corner of Almie Street and Kedzie

Avenue, Chicago, having a frontage of 68 feet on Kedzie Avenue and

running to a depth of 125 feet on Almie Street. It is improved

with a three and four story and English basement building of pressed

brick and stone trim front and sides, containing 60 single hotel rooms,

each with a bath, 20 kitchenette furnished apartments, two of three

rooms, four of two rooms and 14 of 1 1/2 room apartments, each apartment

with a bath. On the ground floor is a lobby and a lounge 24 x 28

feet. There are seven stores facing on Kedzie Avenue. Title to the

real estate was in the Almie Kedzie Building Corporation. The

building is commonly known as the Almie Block. Bond issue was

outstanding, secured by a trust deed to Western Trust Company, as

trustee. Plaintiff and defendant were directors of the trust company.

In 1933 the face value of the bonds outstanding under the first trust

deed was \$128,800. The owner defaulted in the payment of principal,

interest and taxes, and on July 25, 1935 the Western Trust Company,

as trustee, through its attorneys Herhenson and Herhenson, filed a complaint in the Superior Court of Cook County to foreclose the first trust deed. On August 16, 1933, a receiver was appointed. On December 8, 1934 the Heitman Trust Company was appointed trustee in possession. A decree was entered in the foreclosure suit and publication for sale was ordered. In June, 1935 the equity owner (the building corporation) filed in the Federal District Court a petition for reorganization under the provisions of Section 77-B of the Bankruptcy Act. An order was entered restraining the plaintiff in the Superior Court from proceeding with the sale. On June 15, 1935 the trust company was appointed trustee in bankruptcy. On December 18, 1936 the petition for reorganization in the Federal Court was dismissed. In connection with the disposition of the 77-B proceeding, the equity owner was paid \$5,000.00 for conveyance of its title to a nominee of the bondholders. Thereupon the foreclosure case in the Superior Court was completed and good title to the premises was vested in a new corporation called the 3206 Ainslie Street Building Corporation. The former bondholders who joined in the plan of reorganization received stock in the new corporation in place of their bonds. The trust company acted as trustee in possession until October 1, 1937. On that day the property was turned over to the new corporation. From and after October 1, 1937 the Nikolas Realty Company has managed and operated the building, receiving as compensation 5% of the gross income. Defendant is president of the Nikolas Realty Company.

Pursuing his argument that there was no preponderance of evidence in favor of the plaintiff, defendant points out that he (plaintiff) set out to establish (1) that the defendant entered into an agreement retaining plaintiff to act as his counsel; (2) that plaintiff served defendant pursuant to this employment; and (3) that the amount claimed was agreed to, or was fair and reasonable for the services rendered. This is a fair statement of the burden imposed on plaintiff. Plaintiff testified that he entered into an agreement with



Company. Defendant is president of the Nicholas Realty Company has managed and operated the building, receiving an compensation 25 of the gross income. From and after October 1, 1937 the Nicholas Realty new corporation. On that day the property was turned over to the their bonds. The trust company acted as trustee in possession until of reorganization received stock in the new corporation in place of Building Corporation. The former bondholders who joined in the plan premises was voted in a new corporation called the 3608 Alameda Street case in the Superior Court was completed and good title to the its title to a nominee of the bondholders. Thereupon the foreclosure proceeding, the equity owner was paid \$3,000.00 for conveyance of Court was dismissed. In connection with the disposition of the 37-2 December 18, 1938 the petition for reorganization in the Federal 1938 the trust company was appointed trustee in bankruptcy. On in the Superior Court from proceeding with the sale. On June 15, the bankruptcy act. An order was entered restraining the plaintiff petition for reorganization under the provisions of Section 77-B of (the building corporation) filed in the Federal District Court a publication for sale was ordered. In June, 1938 the equity owner in possession. A decree was entered in the foreclosure suit and On December 8, 1934 the National Trust Company was appointed trustee first trust deed. On August 18, 1933, a receiver was appointed. a complaint in the Superior Court of Cook County to foreclose the as trustees, through its attorneys Herndon and Herndon, filed

plaintiff. Plaintiff testified that he entered into an agreement with services rendered. This is a fair statement of the burden imposed on the amount claimed was agreed to, or was fair and reasonable for the plaintiff served defendant pursuant to this employment; and (3) that an agreement retaining plaintiff to act as his counsel; (2) that (plaintiff) set out to establish (1) that the defendant entered into evidence in favor of the plaintiff, defendant potato out that he Pursuing his argument that there was no preponderance of



defendant orally at a conference in the offices of the Heitman Trust Company, 10 South La Salle Street, Chicago, in the early part of September, 1935, and that by the agreement defendant retained plaintiff to represent defendant as his lawyer. Defendant denies positively that he ever requested plaintiff to represent him and denies that the conference ever took place. Plaintiff has been a member of the Bar of this State for many years. Defendant has been a successful businessman of long standing. The record contains no evidence of the character or previous business dealings of either of these gentlemen which could be said to tend to justify the ascribing of greater or less weight to the word of one of them than to that of the other. The interest of plaintiff in the outcome of the case was to obtain the sum he claimed. The interest of defendant was to avoid payment of that sum. Plaintiff testified that he was told by defendant that a bondholders' meeting should be called and that defendant wanted plaintiff as chairman of the committee which should be created. Plaintiff further testified that a meeting occurred pursuant to this conversation at which time he (plaintiff) was made a member of the committee and was selected as chairman. Defendant testified that he never made the statement; that he had nothing to do with calling the bondholders' meeting and had nothing to do with selecting Bishop as a member or as chairman of the committee, other than his failure to object as a bondholder to plaintiff's nomination. Attorney Harry Hershenson, a disinterested witness, testified that the bondholders' meeting was called by the trustee, whom he represented at his (Hershenson's) suggestion, and that he presided at the meeting. Karl Reinke, an officer of the Heitman Trust Company, also a disinterested witness, testified that the bondholders' meeting was called by the trust company; that the members of the committee and the chairman were all selected by Lindgren, an officer of the trust company, in advance, and that he (Reinke) was given the names and was assigned the task of "engineering" their selection at the bondholders' meeting; and

defendant orally at a conference in the office of the defendant's  
company, 10 South La Salle Street, Chicago, in the early part of  
September, 1938, and that by the agreement defendant retained plaintiff  
to represent defendant as his lawyer. Defendant denied positively  
that he ever requested plaintiff to represent him and denied that  
the conference ever took place. Plaintiff has been a member of the  
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further testified that a meeting occurred pursuant to this conversation  
at which time he (plaintiff) was made a member of the committee and  
was selected as chairman. Defendant testified that he never made the  
statement; that he had nothing to do with calling the bondholders'  
meeting and had nothing to do with selecting plaintiff as a member or  
as chairman of the committee, other than his failure to object as a  
bondholder to plaintiff's nomination. Attorney Harry Herchenow, a  
disinterested witness, testified that the bondholders' meeting was  
called by the trustee, whom he represented at his (Herchenow's)  
suggestion, and that he presided at the meeting. Earl Reineke, an  
officer of the Helman Trust Company, also a disinterested witness,  
testified that the bondholders' meeting was called by the trustee  
company; that the members of the committee and the chairman were all  
selected by Lindgren, an officer of the trust company, in advance,  
and that he (Reineke) was given the names and was assigned the task  
of "calling the ring" their selection as the bondholders' meeting; and



that he carried out that task. He testified further that he never talked to defendant about the selection of the committee except to inquire of him during the meeting as to whether he would serve on it. The testimony of Hershenson and Reinke tends to contradict plaintiff's testimony and to corroborate the testimony of defendant. A letter dated September 11, 1935, directed to the bondholders and received in evidence without objection, shows that the meeting of the bondholders at which the bondholders' committee was selected, was called by the trustee to be held at its office at 3:00 P.M. on September 17, 1935. Plaintiff was chosen as chairman and defendant was chosen as a member of the bondholders' committee. Plaintiff testified that defendant told him that he (defendant) had selected an appraiser named George W. Busch; that defendant showed plaintiff Busch's certificate of appraisal and that defendant told plaintiff that he had obtained this certificate from Busch. Defendant testified that he never saw Busch, had no dealings with him, and never saw the appraisal until it was shown to him by the trust company. Mr. Hershenson testified that Busch was hired by him for the trust company to make the appraisal and that Busch was paid by the trust company for this service. Plaintiff testified that at the time he was retained by defendant the latter told him that he and his family owned \$50,000.00 in bonds on the Ainslie Block. Plaintiff also testified that he appeared in the Federal Court and contested the reorganization proceedings at the request of defendant. In arguing that this testimony as to plaintiff's employment by defendant is contradicted by the plaintiff's own prior statements made in the Federal Court and plaintiff's actions in that court, defendant points out that plaintiff filed the petition in the Federal Court in the name of the members of the committee as representing 74% of the bonds and on behalf of any other bondholders who cared to join, including himself; that he (plaintiff) represented to the Federal Court



that he carried out that task. He testified further that he never talked to defendant about the selection of the committee except to inquire of him during the meeting as to whether he would serve on it. The testimony of Horvath and Burke tends to contradict plaintiff's testimony and to corroborate the testimony of defendant. A letter dated September 11, 1935, directed to the bondholders and received in evidence without objection, shows that the meeting of the bondholders at which the bondholders' committee was selected, was called by the trustee to be held at its office at 3:00 P.M. on September 12, 1935. Plaintiff was chosen as chairman and defendant was chosen as a member of the bondholders' committee. Plaintiff testified that defendant told him that he (defendant) had selected an appraiser named George Bush; that defendant showed plaintiff Bush's certificate of appraisal and that defendant told plaintiff that he had obtained this certificate from Bush. Defendant testified that he never saw Bush, had no dealings with him, and never saw the appraisal until it was shown to him by the trust company. Mr. Horvath testified that Bush was hired by him for the trust company to make the appraisal and that Bush was paid by the trust company for this service. Plaintiff testified that at the time he was retained by defendant the latter told him that he and his family owned \$20,000.00 in bonds on the Illinois Rock. Plaintiff also testified that he appeared in the Federal Court and contested the reorganization proceedings at the request of defendant. In arguing that this testimony as to plaintiff's employment by defendant is contradicted by the plaintiff's own prior statements made in the Federal Court and plaintiff's action in that court, defendant points out that plaintiff filed the petition in the Federal Court in the name of the members of the committee as representing 7 of the bonds and on behalf of any other bondholders who cared to join, including himself; that he (plaintiff) represented to the Federal Court

that he was speaking for and representing 74% of the entire bond issue; that he was speaking for bondholders holding over \$150,000.00 out of a total issue of \$166,500.00 of bonds; that all of these bondholders had signed a request for liquidation; that he "told the Federal Court" that he was chairman of the bondholders' committee and that he spoke for the bondholders; that he had a mandate from the bondholders and that he was also a substantial bondholder. Defendant maintains that plaintiff's own words rise to contradict him and that either plaintiff was telling the truth in the Federal proceeding in his representations to that court and was not telling the truth in his testimony in the instant case, or vice versa; that both statements could not be true and that they are directly contradictory. Defendant denied that he or his family ever owned \$50,000.00 worth of the bonds, or that he ever requested plaintiff to represent him in the reorganization proceedings. Defendant, alluding to plaintiff's claims that defendant was benefited by plaintiff's services to the extent of the difference between \$25,000.00 in stock which the equity owner wanted for his interest, and \$5,000.00, for which the equity was eventually purchased, points out that Attorney Hershenson testified that he (Hershenson) purchased the equity with money advanced by the trustee for all of the bondholders.

Plaintiff testified that he devoted approximately 60 days of his time to the affairs of defendant, and that the services extended over a period of approximately three years. Defendant calls attention to the admission of plaintiff that defendant was never in his office; that plaintiff never wrote defendant a letter; that plaintiff never made any record of his services to defendant; that plaintiff kept no memoranda of the time spent and that he did not render a bill or written statement to defendant. Defendant urges that these circumstances give rise to a strong inference that plaintiff never had defendant as a client. Defendant testified that he personally owned \$3,000.00 in bonds of the Ainalie Block issue; and that as near as he could state



that he was speaking for and representing 74% of the entire bond issue; that he was speaking for bondholders holding over 120,000.00 out of a total issue of 180,000.00 of bonds; that all of these bondholders had signed a request for liquidation; that he told the Federal Court that he was chairman of the bondholders' committee and that he spoke for the bondholders; that he had a mandate from the bondholders and that he was also a substantial bondholder. Defendant maintains that plaintiff's own words rise to contradict him and that either plaintiff was telling the truth in the Federal proceeding in his representations to that court and was not telling the truth in his testimony in the instant case, or vice versa; that both statements could not be true and that they are directly contradictory. Defendant testified that he or his family ever owned \$50,000.00 worth of the bonds, or that he ever requested plaintiff to represent him in the reorganization proceeding. Defendant, alluding to plaintiff's claim that defendant was benefited by plaintiff's services to the extent of the difference between \$25,000.00 in stock which the equity owner wanted for his interest, and \$2,000.00 for which the equity was eventually purchased, points out that Attorney Heranson testified that he (Heranson) purchased the equity with money advanced by the trustee for all of the bondholders. Plaintiff testified that he devoted approximately 60 days of his time to the affairs of defendant, and that the services extended over a period of approximately three years. Defendant calls attention to the admission of plaintiff that defendant was never in his office; that plaintiff never wrote defendant a letter; that plaintiff never made any record of his services to defendant; that plaintiff kept no memoranda of the time spent and that he did not render a bill or written statement to defendant. Defendant urges that these circumstances give rise to a strong inference that plaintiff never had defendant as a client. Defendant testified that he personally owned \$2,000.00 in bonds of the Annie Block issue; and that as near as he could state



relatives owned an aggregate of \$30,000.00 in bonds, but that he had no control over these bonds. Plaintiff owned \$6,000.00 in bonds of the Ainslie Block issue. Defendant states that plaintiff's interest was twice that of defendant. Defendant declares that it would seem strange indeed that defendant, a business man, would retain a lawyer who had twice as much personal interest in a matter as he himself and undertake to bear all the costs and expenses of the litigation, and that this circumstance weighs heavily against plaintiff's testimony. Plaintiff testified that he had conversations on several occasions with defendant at defendant's club, located on Michigan Avenue. Defendant testified that he did not belong to any club on Michigan Avenue. Defendant testified that during the very time plaintiff claims to have represented him, defendant hired an attorney named Elmer Freytag to represent him in the very matter involved. Defendant maintains that the instant suit was brought as an afterthought and that plaintiff had no intention initially of claiming any fee against him. Attorney Hershenson testified that plaintiff sought to obtain part of the fee which he as attorney for the trust company had obtained, and that the work for which plaintiff was seeking compensation out of Mr. Hershenson's fee was the identical work for which plaintiff claims compensation in this case. Plaintiff denied asking Hershenson for any part of his fee.

On the issue as to whether plaintiff served defendant pursuant to his employment, plaintiff states that obviously if plaintiff was not employed at all by defendant, he did not serve the defendant. Defendant calls attention to the appearance of plaintiff in the reorganization proceeding in the Federal Court wherein plaintiff represented himself as a "substantial bondholder", and that he appeared for the bondholders' committee. Defendant states that there is no evidence in the record, including the testimony of plaintiff, that defendant was ever authorized to act for any of the other bondholders, except as he might act as a member of the committee, and

relatives owned an aggregate of 30,000.00 in bonds, but that he had no control over these bonds. Plaintiff owned 8,000.00 in bonds of the same stock as the defendant's. Defendant states that plaintiff's interest was twice that of defendant. Defendant believes that it would be strange indeed that defendant, a business man, would retain a lawyer who had twice as much personal interest in the matter as he himself.

and undertake to bear all the costs and expenses of the litigation, and that this circumstance weighs heavily against plaintiff's testimony. Plaintiff testified that he had conversations on several occasions with defendant at defendant's club, located on Michigan Avenue. Defendant testified that he did not belong to any club on Michigan Avenue. Defendant testified that during the very time that plaintiff claims to have represented him, defendant hired an attorney named Isaac Freytag to represent him in the very matter involved. Defendant maintains that the instant suit was brought as an attempt to obtain part of the fee which he as attorney for the trust company had obtained, and that the work for which plaintiff was seeking compensation out of Mr. Heranson's fee was the identical work for which plaintiff claims compensation in this case. Plaintiff denied asking Heranson for any part of his fee.

On the issue as to whether plaintiff served defendant pursuant to his employment, plaintiff states that obviously if plaintiff was not employed at all by defendant, he did not serve the defendant. Defendant calls attention to the appearance of plaintiff in the representation proceeding in the Federal Court wherein plaintiff represented himself as a "substantial bondholder", and that he acted for the bondholders' committee. Defendant states that there is no evidence in the record, including the testimony of plaintiff, that defendant was ever authorized to act for any of the other bondholders, except as he might act as a member of the committee, and



that whatever action plaintiff took on behalf of the owners of \$130,000.00 in bonds was on defendant's behalf only to the extent that defendant was the owner of \$3,000.00 in bonds. Defendant further states that plaintiff had several capacities in his activities in the federal proceedings; that as a bondholder he voiced his views and represented his own interest and shared in any benefits that were derived; that as chairman of the bondholders' committee he acted as fiduciary and principal and directed his own activity; and that as attorney he appeared for the committee and that he was also acting as a "selected buffer of the Heitman Trust Company", which in turn, as trustee, represented the entire bond issue.

On the issue of whether the amount charged was agreed upon or was reasonable, defendant points out that the only evidence of value was given by plaintiff, and that whether there was any agreement as to value rests upon plaintiff's unsupported but contradicted testimony; that defendant based his charge on 25% of the alleged saving of \$20,000.00. Defendant insists that according to the value of the stock the saving would be \$10,000.00, and that consequently the 25% testified to as a standard on which plaintiff fixed his fee would have amounted to \$2,500.00 and not \$5,000.00. Defendant states further that even if he had owned or controlled \$50,000.00 of the bond issue, this would have amounted to only 5/13ths of the bonds plaintiff claimed to represent, and defendant's pro rata share of the fee even on that basis would have been \$961.50; and that defendant actually owned \$3,000.00 in bonds, which would have made his pro rata share of the fee \$57.69. Defendant points out that substantially the entire testimony of plaintiff was directed to claiming compensation for his activities in resisting the reorganization proceeding in the Federal Court. Defendant sums up his contentions that the judgment is manifestly contrary to the weight of the evidence and should be reversed by saying that (1) the testimony of plaintiff on the issues is not



that whatever action plaintiff took on behalf of the owner of \$130,000.00 in bonds was on defendant's behalf only to the extent that defendant was the owner of \$1,000.00 in bonds. Defendant further states that plaintiff had several executives in his activities in the federal proceedings; that as a bondholder he voiced his views and represented his own interest and shared in any benefits that were derived; that as chairman of the bondholders' committee he acted as fiduciary and principal and directed his own activity; and that as attorney he appeared for the committee and that he was also acting as a "selected officer of the Helms Trust Company", which in turn, as trustee, represented the entire bond issue.

On the issue of whether the amount charged was agreed upon or was reasonable, defendant points out that the only evidence of value was given by plaintiff, and that whether there was any agreement as to value rests upon plaintiff's unsupported but contradicted testimony; that defendant based his charge on 2 1/2% of the alleged saving of \$3,000.00. Defendant insists that according to the value of the stock the saving would be 10,000.00, and that consequently the 2 1/2% testified to as a standard on which plaintiff fixed his fee would have amounted to \$2,500.00 and not \$750.00. Defendant states further that even if he had owned or controlled \$3,000.00 of the bond issue, this would have amounted to only 6 1/3% of the bonds plaintiff claimed to represent, and defendant's pro rata share of the fee even on that basis would have been \$21.50; and that defendant actually owned \$3,000.00 in bonds, which would have made his pro rata share of the fee \$7.50. Defendant points out that substantially the entire testimony of plaintiff was directed to obtaining compensation for his activities in resisting the reorganization proceeding in the federal court. Defendant sums up his contention that the judgment is manifestly contrary to the weight of the evidence and should be reversed by saying that (1) the testimony of plaintiff on the issues is not

supported by any other evidence whatever; (2) the testimony of plaintiff is contradicted in every detail on every issue; (a) it is contradicted on every issue by the defendant; (b) it is contradicted directly by the disinterested testimony of Freytag, Hershenson and Reinke on every point in issue except the conferences which plaintiff claims he had with the defendant without anyone else present, and as to those conferences it is contradicted by the facts and circumstances amply established by these three witnesses inconsistent with ascribing any credence to plaintiff's testimony; (c) it is contradicted by plaintiff's admitted acts; (d) it is contradicted by plaintiff's prior representations to the Federal Court, and his verified petition filed in that court; (e) it is contradicted by plaintiff's admitted conduct; his lack of records or correspondence, his attempting to collect the same fee from Hershenson and his never having defendant at his office; (f) it is contradicted by its unreasonableness, which ascribes an undertaking to bear the burden of the entire cost of litigation to a bondholder holding less than 3% of the issue; and (3) the testimony of defendant is corroborated throughout by facts, admissions, circumstances amply established, and by the direct testimony of disinterested witnesses.

Plaintiff testified that defendant asked him to represent the bondholders' committee for him and induced plaintiff to become the chairman of that committee. Plaintiff further testified that he was consulted by defendant as to the other buildings listed in which defendant was interested and that he performed services for the defendant as to such buildings; that after performing much of the service about which he testified he had a conversation with the defendant in which he requested his fee; that he informed defendant his fee would be \$5,000.00; that defendant then inquired whether the \$5,000.00 would cover all other matters that plaintiff had looked after for him on the other buildings as well as the Ainslie Block, to which



supported by any other evidence whatever; (2) the testimony of Plaintiff is contradicted in every detail on every issue; (a) it is contradicted on every issue by the defendant; (b) it is contradicted directly by the disinterested testimony of Tregar, Hershenson and Perkins on every point in issue except the conference which Plaintiff claims he had with the defendant without anyone else present, and as to those conferences it is contradicted by the facts and circumstances amply established by these three witnesses inconsistent with ascribing any evidence to Plaintiff's testimony; (c) it is contradicted by Plaintiff's admitted notes; (d) it is contradicted by Plaintiff's prior representations to the Federal Court, and his verified petition filed in that court; (e) it is contradicted by Plaintiff's admitted conduct; his lack of records or correspondence, his attempting to collect the same fee from Hershenson and his never having defendant at his office; (f) it is contradicted by its unreasonableness, which ascribes an undertaking to bear the burden of the entire cost of litigation to a bondholder holding less than 2% of the issue; and (3) the testimony of defendant is corroborated throughout by facts, admissions, circumstances amply established, and by the direct testimony of disinterested witnesses.

Plaintiff testified that defendant asked him to represent the bondholders' committee for him and induced Plaintiff to become the chairman of that committee. Plaintiff further testified that he was consulted by defendant as to the other buildings listed in which defendant was interested and that he performed services for the defendant as to such buildings; that after performing much of the service about which he testified he had a conversation with the defendant in which he requested his fee; that he informed defendant his fee would be \$5,000.00; that defendant then inquired whether the \$5,000.00 would cover all other matters that Plaintiff had looked after for him on the other buildings as well as the Alameda Block, to which



plaintiff replied that while he should make an additional charge for such other matters he was willing that all of the matters should be covered by the fee of \$5,000.00. He did not testify, nor was he asked, as to the time occupied by him in performing the services on the various buildings about which he claimed he was consulted. It is apparent, however, that most of the time for which he charged was expended in connection with the 77-B proceeding in the Federal Court. Jerome J. Sladkey, who was associated with plaintiff in the practice of law, testified that early in the Fall of 1935 he met defendant on two occasions at the office of the trust company; that on one of these occasions defendant spoke to him; that defendant said to the witness that he was told by Mr. Lindgren that plaintiff was an expert on evaluations and that he did not think the equity owner should get anything because the property was not worth the bond issue; that in that conversation defendant asked witness if he supposed plaintiff would handle the matter personally; that witness said: "Well, the evaluation problem is right down Mr. Bishop's alley and I saw no reason why he would not handle it personally." The conversation between Mr. Sladkey and defendant was not denied. However, defendant states that the inquiry was logical for a member of the bondholders' committee and carried no inference of employment of plaintiff by defendant. Mr. Elmer Freytag testifying for defendant, stated that during the time of the negotiations for the purchase of the equity, he represented defendant; that he entered into negotiations on behalf of the defendant for the purchase of the equity; that he was attempting to purchase the equity for all the bondholders; that he was speaking, however, for defendant who was his client; that he was in communication with the attorneys for the owner and with Mr. Herenhenson; and that he (witness) rendered a bill for his services to defendant and that it was paid.

plaintiff replied that while he should make an additional entry for such other matters he was willing that all of the matters should be covered by the fee of \$5,000.00. He did not testify, nor was he asked, as to the time occupied by him in reviewing the services on the various buildings about which he claimed he was consulted. It is apparent, however, that most of the time for which he charged was expended in connection with the T-2 proceeding in the Federal Court. Jerome J. Blakely, who was associated with plaintiff in the practice of law, testified that early in the Fall of 1935 he was defendant on two occasions at the office of the trust company; that on one of these occasions defendant spoke to him; that defendant said to the witness that he was told by Mr. Lindgren that plaintiff was an expert on evaluations and that he did not think the equity owner should get anything because the property was not worth the bond issue; that in that conversation defendant asked witness if he supposed plaintiff would handle the matter personally; that witness said: "Well, the evaluation problem is right down Mr. Blakely's alley and I saw no reason why he would not handle it personally." The conversation between Mr. Blakely and defendant was not denied. However, defendant states that the inquiry was logical for a member of the bondholders' committee and carried no inference of employment of plaintiff by defendant. Mr. Liner, lawyer testifying for defendant, stated that during the time of the negotiations for the purchase of the equity, he represented defendant; that he entered into negotiations on behalf of the defendant for the purchase of the equity; that he was attempting to purchase the equity for all the bondholders; that he was speaking, however, for defendant who was his client; that he was in communication with the attorneys for the owner and with Mr. Hershenson; and that he (witness) rendered a bill for his services to defendant and that it was paid.



*Mr. Freytag rendered a bill to Mr. Nikolai for his services and it was paid.*

The testimony of Mr. Freytag shows that despite defendant's claim that his interest in the bond issue was only \$5,000.00 that he hired Mr. Freytag to represent him in order to secure the transfer of the equity for all of the bondholders. The jury in passing on the case might well have reflected that if defendant hired Mr. Freytag on a matter which was to benefit all of the bondholders, it would not be unreasonable to believe the testimony of plaintiff that defendant had hired plaintiff for services to be rendered in behalf of all the bondholders. On February 18, 1938 defendant wrote a letter to the stockholders. There was to be an annual meeting of the stockholders on February 23, 1938 and apparently two men, Walter Hamilton and Charles F. Henry, had sent out letters asking for proxies. There was evidently some charge or inference in the letter to the stockholders that defendant had mismanaged the property for "six years." In his letter of February 18, 1938 to the stockholders defendant quoted from the court records from the time the original complaint in the foreclosure case was filed to show that defendant did not gain control of the building until October 1, 1937. In this letter defendant states: "Do you see my name in the above record of the past four years? I have been in control of this building since October 1st, 1937, only four months. After the property was reorganized I had Tylman & Pond, Public Accountants, audit the Heitman Trust Company's books, with their full cooperation. We found the Heitman Trust Company's books in order up to the date of the audit. I personally paid for this audit. I also was instrumental in buying the title for \$5,000.00 instead of giving the title owner \$25,000.00 in stock. I have rendered much personal service in the management since the incorporation, all without charge. I am charged with operating the building at a loss last year. However, the Heitman Trust Company managed the building during this period. By referring to your statements from the Heitman Trust Company for 1937 you will find as follows: Gross Income \$34,152.16; Operating Expense \$19,417.77;



The testimony of Mr. Frey shows that despite defendant's claim that his interest in the bond issue was only \$5,000.00 that he hired Mr. Frey to represent him in order to secure the transfer of the equity for all of the bondholders. The jury in passing on the case might well have reflected that if defendant hired Mr. Frey on a matter which was to benefit all of the bondholders, it would not be unreasonable to believe the testimony of plaintiff that defendant had hired plaintiff for services to be rendered in behalf of all the bondholders. On February 18, 1938 defendant wrote a letter to the stockholders. There was to be an annual meeting of the stockholders on February 22, 1938 and apparently two men, Walter Hamilton and Charles F. Barry, had sent out letters asking for proxies. There was evidently some charge or inference in the letter to the stockholders that defendant had mismanaged the property for "six years." In his letter of February 18, 1938 to the stockholders defendant quoted from the court records from the time the original complaint in the foreclosure case was filed to show that defendant did not gain control of the building until October 1, 1937. In this letter defendant states: "Do you see my name in the above record of the past four years? I have been in control of this building since October 1st, 1937, only four months. After the property was reorganized I had Hyman & Bond, Public Accountants, audit the Helman Trust Company's books, with their full cooperation. We found the Helman Trust Company's books in order up to the date of the audit. I personally paid for this audit. I also was instrumental in buying the title for \$5,000.00 instead of giving the title owner \$25,000.00 in stock. I have rendered much personal service in the management since the incorporation, all without charge. I am charged with operating the building at a loss last year. However, the Helman Trust Company managed the building during this period. My referring to your statements from the Helman Trust Company for 1937 you will find as follows: Gross Income \$24,182.18; Operating Expense \$19,417.77;

Net Operating Profit \$14,734.39. I consider this a fair showing under present renting conditions. The net profit was used to pay on account of back taxes, reorganization fees, etc. The personal attack made on me is below my dignity to consider. Please come to the annual meeting and get complete facts. If you cannot come, kindly send in the proxy sent you by your officers." It is interesting to note that in this letter defendant states that he personally paid for the audit; that he was instrumental in buying the title for \$5,000.00 instead of giving the title owner \$25,000.00 in stock; that he was "in control" of the building since October 1, 1937; and that he had rendered much personal service in the management since the incorporation, all without charge. These statements constitute strong corroboration of the testimony of plaintiff. From all of the record, and particularly defendant's letter of February 18, 1938 and Mr. Freytag's testimony, the jury would be justified in concluding that defendant took a leading, if not dominating, part in the purchase of the equity for \$5,000.00, the dismissal of the 77-B proceeding, the completion of the foreclosure case and the reorganization of the mortgage indebtedness on the property. Viewing the entire record, we are unable to agree with the defendant that the judgment is manifestly contrary to the weight of the evidence.

Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, J. CONCURS.

HEBEL, P.J. TOOK NO PART.



Net Operating Profit 14,784.59. I consider this a fair showing under present renting conditions. The net profit was used to pay on account of back taxes, reorganization fees, etc. The personal attack made on me is below my dignity to consider. Please come to the annual meeting and get complete facts. If you cannot come, kindly send in the proxy sent you by your officers. It is interesting to note that in this letter defendant states that he personally paid for the audit; that he was instrumental in paying the title for \$2,000.00 instead of giving the title owner \$2,000.00 in stock; that he was "in control" of the building since October 1, 1937; and that he had rendered much personal service in the management since the incorporation, all without charge. These statements constitute strong corroboration of the testimony of plaintiff. From all of the record, and particularly defendant's letter of February 15, 1938 and Mr. Freyer's testimony, the jury would be justified in concluding that defendant took a leading, if not dominating, part in the purchase of the equity for \$2,000.00, the dismissal of the 77-B proceedings, the completion of the foreclosure sale and the reorganization of the mortgage indebtedness on the property. Viewing the entire record, we are unable to agree with the defendant that the judgment is manifestly contrary to the weight of the evidence.

Therefore, the judgment of the Circuit Court of Cook County

is affirmed.

JUDGMENT AFFIRMED.

KIRBY, J. CONCURRING.

HEARD, J. J. FOR NO PART.



42630

G. S. FREUDENTHAL,

Appellee,

v.

C. E. L. LIPMAN,

Appellant.

320 I.A. 681

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On September 16, 1942 a judgment by confession was entered in the Circuit Court of Cook County in favor of George S. Freudenthal and against C. E. L. Lipman for \$3,393.08, based on three promissory notes for \$1,000 each, dated February 23, 1939, March 10, 1939 and April 18, 1939, signed by C. E. L. Lipman and by him endorsed, each payable on or before two years with interest at 5% per annum after date. In due time defendant moved to vacate the judgment and for leave to plead to the complaint and to defend the suit upon the merits. The motion was supported by a verified petition. The court denied the motion to vacate the judgment and the defendant appealed.

The petition reads as follows:

"That on the 23rd day of February, 1939 the plaintiff George S. Freudenthal, entered into a written contract with the Lipman Patents Corporation, a Delaware Corporation, a copy of which contract is attached hereto and made a part hereof, marked: 'Defendant's Exhibit A'. That pursuant to the terms of said contract, defendant's Exhibit A, plaintiff herein agreed to advance to the said Lipman Patents Corporation \$3,000.00 to be used in exploration work and promotion of certain patented devices owned and controlled by said corporation; that the said contract, among other things, provided in substance that the money so advanced by the plaintiff in the above entitled cause to the said corporation would be repaid to said plaintiff from moneys received from royalties from said patents and in addition thereto and in consideration of said loan, said corporation agreed to give to said plaintiff certain royalty interests in said patents. That at the time of the execution of said contract, defendant's Exhibit A, your petitioner (defendant herein) was the president and chief stock holder of said corporation. That pursuant to the terms of said contract, defendant's Exhibit A, plaintiff herein, George S. Freudenthal, advanced to said corporation for the purposes hereinabove set forth \$3,000.

350 I.A. 181

CIRCUIT COURT  
 COOK COUNTY, ILL.  
 In the Office of the Clerk of the Court  
 at Chicago, Illinois  
 This 18th day of April, 1930

C. E. LILLYMAN, Plaintiff,  
 vs.  
 GEORGE S. FRENDELSHAL, Defendant.

MR. JUSTICE WELLS DELIVERED THE OPINION OF THE COURT.

On September 18, 1928 a judgment by confession was entered in the Circuit Court of Cook County in favor of George S. Frenshelhal and against C. E. L. Lillyman for \$2,282.00, based on three promissory notes for \$1,000 each, dated February 22, 1929, March 10, 1929 and April 18, 1929, signed by C. E. L. Lillyman and by his underset, each payable on or before two years with interest at 5% per annum after date. In due time defendant moved to vacate the judgment and for leave to plead to the complaint and to defend the suit upon the merits. The motion was supported by a verified petition. The court denied the motion to vacate the judgment and the defendant appealed.

The petition reads as follows:

"That on the 20th day of February, 1929 the plaintiff George S. Frenshelhal, entered into a written contract with the Lilman Patent Corporation, a Delaware Corporation, a copy of which contract is attached hereto and made a part hereof, marked 'Defendant's Exhibit A'. That pursuant to the terms of said contract, defendant's Exhibit A, plaintiff herein agreed to advance to the said Lilman Patent Corporation \$2,000.00 to be used in exploration work and promotion of certain patented devices owned and controlled by said corporation; that the said contract, among other things, provided in substance that the money so advanced by the plaintiff in the above entitled cause to the said corporation would be repaid to said plaintiff from monies received from royalties from said patents and in addition thereto and in consideration of said loan, said corporation agreed to give to said plaintiff certain royalty interests in said patents. That at the time of the execution of said contract, defendant's Exhibit A, your petitioner (defendant herein) was the president and chief stock holder of said corporation. That pursuant to the terms of said contract, defendant's Exhibit A, plaintiff herein, George S. Frenshelhal, advanced to said corporation for the purposes hereinabove set forth \$2,000.



That said contract, among other things, provided in Paragraph 4 thereof: '4. - In further consideration of said loan by Freudenthal to Lipman, (Lipman Patents Corporation), C. E. L. Lipman hereby unconditionally guarantees the payment of the principal loaned hereunder, and interest thereon at the rate of five percent (5%) per annum, unless otherwise repaid within two years from the date hereof; and as evidence of said guarantee, C. E. L. Lipman hereby covenants and agrees to execute and sign personal judgment note or notes, payable on or before two years concurrently with any advance that may be made hereunder by Freudenthal to Lipman (Lipman Patents Corporation). All payments by Lipman to Freudenthal under paragraph 2 hereof shall be endorsed on the appropriate note or notes of said guarantor.' That pursuant to the terms of said contract and more particularly pursuant to the terms of Paragraph 4 of said contract hereinabove set forth, your petitioner executed or caused to be executed three promissory notes in the sum of \$1,000 each, and delivered said promissory notes to the plaintiff herein, George S. Freudenthal. That the said promissory notes of \$1,000 each, delivered by your petitioner to George S. Freudenthal, the plaintiff herein pursuant to the guarantee clause of said contract, defendant's Exhibit A, are the same promissory notes upon which judgment was confessed by the said George S. Freudenthal against your petitioner on September 16, 1942, in the sum of \$3,393.08 and costs. That your petitioner did not receive any consideration for the execution of said promissory notes other than the indirect benefit that he might receive as principal stock holder in said corporation, to whom said loan was made by the plaintiff. That said promissory notes upon which judgment by confession was entered against your petitioner in this case were executed by your petitioner pursuant to Paragraph 4 of said contract of February 23, 1939, defendant's Exhibit A, as guarantor. Your petitioner further represents unto this Court that after said judgment notes upon which the judgment in this case is predicated against your petitioner were executed and delivered, the plaintiff herein, George S. Freudenthal entered into an agreement dated the 31st day of January, 1940, with the Lipman Patents Corporation and petitioner, said agreement being a supplemental agreement to the said agreement between the plaintiff herein and the Lipman Patents Corporation, dated February 23, 1939, herein above referred to as Defendant's Exhibit A. A copy of said supplemental agreement dated January 31, 1940 is hereto attached, marked defendant's Exhibit B, and by reference is incorporated herein and made a part hereof. Your petitioner further represents unto this Court that pursuant to the terms of said supplemental agreement, the said George S. Freudenthal released and discharged your petitioner, his heirs, executors and assigns, of any and all claims that he had or might have against them or either of them on account of any matters set forth in said contract of February 23, 1939. That by virtue of said supplemental agreement, defendant's Exhibit B, your petitioner's liability under said contract dated February 23, 1939, defendant's Exhibit A, as guarantor, was waived, released and discharged, and said promissory notes, delivered by your petitioner to plaintiff, George S. Freudenthal pursuant to the guarantee clause of said contract, defendant's Exhibit A and which are the same promissory notes upon which judgment by confession against your petitioner was entered on the 16th day of September, 1942, became void and of no effect. Your Petitioner further represents that the promissory notes upon which



That said contract, among other things, provided in substance as follows: "That the said contract, among other things, provided in substance as follows: '4. - In further consideration of said loan by Lippman Patent Corporation to Lippman Patent Corporation, L. L. Lippman hereby unconditionally warrants the payment of the principal loaned hereunder, and interest thereon at the rate of five percent (5%) per annum, unless otherwise repaid within two years from the date hereof; and as evidence of said payment, L. L. Lippman hereby covenants and agrees to execute and sign personal judgment note or notes, payable on or before two years commencing with any evidence that may be made hereunder by Lippman Patent Corporation to Lippman Patent Corporation. All payments by Lippman Patent Corporation to Lippman Patent Corporation shall be endorsed on the appropriate note or notes of said guarantor.' That pursuant to the terms of said contract and more particularly pursuant to the terms of paragraph 4 of said contract hereinabove set forth, your petitioner executed or caused to be executed three promissory notes in the sum of \$1,000 each, and delivered said promissory notes to the plaintiff herein, George S. Prudenthal. That the said promissory notes of \$1,000 each, delivered by your petitioner to George S. Prudenthal, the plaintiff herein pursuant to the warranties clause of said contract, before and after the date of said contract, are the same promissory notes upon which judgment was entered by the said George S. Prudenthal against your petitioner on September 16, 1942, in the sum of \$3,325.03 and costs. That your petitioner did not receive any consideration for the execution of said promissory notes other than the indirect benefit that he might receive as principal stockholder in said corporation, to whom said loan was made by the plaintiff. That said promissory notes upon which judgment by consolidation was entered against your petitioner in this case were executed by your petitioner pursuant to paragraph 4 of said contract of February 23, 1939, defendant's Exhibit A, as guarantor. Your petitioner further represents unto this Court that after said judgment notes upon which the judgment in this case is predicated against your petitioner were executed and delivered, the plaintiff herein, George S. Prudenthal entered into an agreement dated the 31st day of January, 1940, with the Lippman Patent Corporation and petitioner, said agreement being a supplemental agreement to the said agreement between the plaintiff herein and the Lippman Patent Corporation, dated February 23, 1939. A copy of said supplemental agreement dated January 31, 1940 is hereto attached, marked defendant's Exhibit B, and by reference is incorporated herein and made a part hereof. Your petitioner further represents unto this Court that pursuant to the terms of said supplemental agreement, the said George S. Prudenthal released and discharged your petitioner, his heirs, executors and assigns, of any and all claims that he had or might have against them or either of them on account of any matters set forth in said contract of February 23, 1939. That by virtue of said supplemental agreement, defendant's Exhibit B, your petitioner's liability under said contract dated February 23, 1939, defendant's Exhibit A, as guarantor, was waived, released and discharged, and said promissory notes, delivered by your petitioner to plaintiff, George S. Prudenthal, pursuant to the warranties clause of said contract, defendant's Exhibit A and which are the same promissory notes upon which judgment by consolidation against your petitioner was entered on the 16th day of September, 1942, became void and of no effect. Your petitioner further represents that the promissory notes upon which

judgment by confession was entered against your petitioner in the above entitled cause, were delivered to the plaintiff by your petitioner upon the express condition that they were to become the obligation of your petitioner only upon the failure of the Lipman Patents Corporation to repay to said plaintiff the loan made by said plaintiff to said corporation within two years from the date of said loans to said corporation. That at no time prior to the entry of judgment against your petitioner on said notes in this case did his obligation on said notes become absolute; that prior to the time that said notes became due upon their face, the said plaintiff, George S. Freudenthal, as above set forth, executed a contract dated January 31, 1940, defendant's Exhibit B, releasing and discharging your petitioner from all liability under said contract of February 23, 1939, defendant's Exhibit A. That petitioner's liability as guarantor under said contract dated February 23, 1939, defendant's Exhibit A, and on said notes upon which judgment by confession against your petitioner was taken on September 16, 1942, which notes were given to said plaintiff by petitioner pursuant to the guarantee clause contained in said contract, never materialized or ripened into an absolute obligation of petitioner as said liability of your petitioner under said guarantee clause was waived, released and discharged by written agreement dated January 31, 1940, defendant's Exhibit B, and all liability of your petitioner on said promissory notes, by virtue of said written agreement of January 31, 1942, defendant's Exhibit B, was thereby waived, released and discharged by plaintiff as aforesaid."

The agreement of February 23, 1939, a copy of which was attached to the petition, reads:

"Agreement made in triplicate this 23rd day of February, 1939 between Lipman Patents Company, a Delaware corporation, hereinafter called 'Lipman' and George S. Freudenthal, hereinafter called 'Freudenthal' and C. E. L. Lipman. Witnesseth: That, Whereas, on August 18, 1938, Lipman and C. E. L. Lipman entered into a contract with RCA Manufacturing Company, Inc., of Camden, New Jersey, hereinafter called 'RCA', for making supplies and preparing drawings for refrigerators and room coolers, a copy of which agreement is attached hereto and marked Exhibit A, and Whereas, said Lipman is the owner of certain patents and controls certain patent applications in the field of air-conditioning and refrigeration, a list of which patents and patent applications is attached hereto and marked Exhibit B, and Whereas, Lipman expects to enter into certain license contracts for the manufacture of refrigerators and room coolers with RCA within the next sixty days after the completion of the aforesaid samples and drawings; and Whereas, Lipman has represented that the total of its liabilities, in connection with the RCA contract, is not in excess of \$2600.00; and Whereas, Lipman is in need of funds to complete said samples and drawings and to meet other corporate obligations in connection with said proposed RCA contract; and Whereas, C. E. L. Lipman has requested Freudenthal to loan monies to Lipman to be used for the aforesaid purposes; Now, Therefore, it is agreed by and between the parties as follows: 1 - Freudenthal hereby agrees to advance Lipman the sum of \$1,000.00 to be used for the aforesaid purposes; said loan to be evidenced by a demand note of Lipman. In the event that Lipman gives Freudenthal satisfactory evidence that it has secured an additional sum of \$3,000.00 from other sources to be used for the above purposes, then, and in such event only, Freudenthal agrees to advance to Lipman a further sum of \$2,000.00, in units of \$1,000.00 each, as Lipman may



judgment by confession was entered against your petitioner in the above entitled cause, were delivered to the plaintiff by your petitioner upon the express condition that they were to become the obligation of your petitioner only upon the failure of the Patent Corporation to repay to said plaintiff the loan made by said plaintiff to said corporation within two years from the date of said loan to said corporation. That at no time prior to the entry of judgment against your petitioner on said notes in this case did his obligation on said notes become absolute; that prior to the time that said notes became due upon their face, the said plaintiff, George B. Presidential, as above set forth, executed a contract dated January 31, 1930, defendant's Exhibit 2, releasing and discharging your petitioner from all liability under said contract of February 22, 1930, defendant's Exhibit 3. That petitioner's liability as guarantor under said contract dated February 22, 1930, defendant's Exhibit 4, and on said notes upon which judgment by confession against your petitioner was taken on September 18, 1930, which notes were given to said plaintiff by petitioner pursuant to the guarantee clause contained in said contract, never, materialized or ripened into an absolute obligation of petitioner as said liability of your petitioner under said guarantee clause was waived, released and discharged by written agreement dated January 31, 1930, defendant's Exhibit 2, and all liability of your petitioner on a promissory note, by virtue of said written agreement of January 31, 1930, defendant's Exhibit 2, was thereby waived, released and discharged by plaintiff as aforesaid."

The agreement of February 22, 1930, a copy of which was

attached to the petition, reads:

"Agreement made in triplicate this 28th day of February, 1930 between Patent Corporation, a Delaware corporation, hereinafter called 'Patent', and George B. Presidential, hereinafter called 'Presidential', and G. B. Patent, hereinafter called 'G. B. Patent'. Patent and G. B. Patent entered into a contract with G. B. Patenting Company, Inc., of Camden, New Jersey, hereinafter called 'G. B. Patenting Company', for making supplies and preparing drawings for refrigerators and room coolers, a copy of which agreement is attached hereto and marked Exhibit A, and Whereas, said Patent is the owner of certain patents and controls certain patent applications in the field of air-conditioning and refrigeration, a list of which patents and patent applications is attached hereto and marked Exhibit B, and Whereas, Patent expects to enter into certain license contracts for the manufacture of refrigerators and room coolers with G. B. Patenting Company within the next sixty days after the completion of the aforesaid samples and drawings; and Whereas, Patent has represented that the total of its liabilities, in connection with the G. B. Patenting Company, is not in excess of \$2500.00; and Whereas, Patent is in need of funds to complete said samples and drawings and to meet other corporate obligations in connection with said proposed G. B. Patenting Company, G. B. Patent has requested Presidential to loan monies to Patent to be used for the aforesaid purposes; Now, Therefore, it is agreed by and between the parties as follows: I - Presidential hereby agrees to advance Patent the sum of \$1,000.00 to be used for the aforesaid purposes; said loan to be evidenced by a demand note of Patent. In the event that Patent gives Presidential satisfactory evidence that it has secured an additional sum of \$2,000.00 from other sources to be used for the above purposes, then, and in such event only, Presidential agrees to advance to Patent a further sum of \$2,000.00, in whole or \$1,000.00 each, as Patent may



request same; and in such event Freudenthal will return to Lipman the demand note hereinabove referred to and will receive in lieu thereof receipt for monies advanced under the terms of this contract. 2 - In the event that Lipman is successful in obtaining said sum of \$3,000.00 from other sources, then all monies advanced by Freudenthal to Lipman under Paragraph 1 hereof shall be repaid in the following manner: As royalties are received by Lipman from time to time, on account of any of the patents or patent applications listed in Exhibit B, from any and all sources whatsoever, Lipman shall pay Freudenthal, on account of each unit of \$1,000.00 so loaned, 7% of all royalties so received, until said loan is repaid to Freudenthal, together with interest thereon at 5%. It is the intention of the parties that if Freudenthal advances, \$2,000.00 he is to receive 14% of all royalties received by Lipman until said loan and interest thereon is repaid, and if Freudenthal advances \$3,000.00, he is to receive 21% of all such royalties until said loan and interest thereon is repaid. 3 - As further consideration for the financing of said loan, Lipman agrees to pay Freudenthal on account of each unit of \$1,000.00 so loaned, 2% of all royalties that it may receive or become entitled to on account of any and all license contracts, whether exclusive or non-exclusive, or any other agreements that it may enter into with RCA, covering the subject matter hereinabove referred to, or involving any of the patents listed in Exhibit B for the life of the original agreement or agreements, and any renewals thereof. If Freudenthal advances \$2,000.00, he shall, under this paragraph, be entitled to 4% of all such royalties, and if he advances \$3,000.00, he shall be entitled to 6% of all such royalties. Such payments of 2% for each \$1,000.00 loaned shall be in addition to the repayments hereinabove provided for in Paragraph 2, it being contemplated that if Freudenthal loans Lipman the sum of \$3,000.00, he shall be entitled to 27% of the R. C. A. royalties until said loan and interest thereon is repaid, and thereafter he shall be entitled to 6% of such RCA royalties. In the event that RCA fails to exercise its option for an exclusive license contract under subparagraph (a) of Section 8 of Exhibit A and no such exclusive license agreement is entered into, then Freudenthal, on account of each unit of \$1,000.00 so loaned, shall be entitled to 2% of any and all royalties that Lipman may receive or become entitled to on account of any and all license agreements involving any of the patents listed in Exhibit B or any other patents that Lipman may acquire in the air-conditioning and refrigeration fields, either for domestic or commercial use, hereinafter entered into by Lipman with any and all persons or corporations, including but not limited to any non-exclusive license agreements that it may enter into with RCA, either under subparagraph (b) of Section 8 of Exhibit A or otherwise, provided, however, that Freudenthal shall not be entitled to any royalties under this Paragraph 3 on account of any existing license agreements or on account of any licensing agreement that may be entered into in connection with the settlement of any present bona fide infringement claim. 4 - In further consideration of said loan by Freudenthal to Lipman, C. E. L. Lipman hereby unconditionally guarantees the payment of the principal loaned hereunder, and interest thereon at the rate of 5% per annum, unless otherwise repaid within two years from the date hereof; and as evidence of said guarantee, C. E. L. Lipman hereby covenants and agrees to execute and sign personal judgment note or notes, payable on or before two years concurrently with any advance that may be made hereunder by Freudenthal to Lipman. All payments by Lipman to Freudenthal under Paragraph 2 hereof shall be endorsed on the appropriate note or notes of said



request same; and in such event Presidential will return to Lipman the demand note heretofore returned to and will receive in like manner receipt for monies advanced under the terms of this contract. 2 - In the event that Lipman is unsuccessful in obtaining said sum of \$2,000.00 from other sources, then all monies advanced by Presidential to Lipman under Paragraph 1 heretofore shall be repaid in the following manner: As royalties are received by Lipman from time to time, on account of any of the patents or patent applications listed in Exhibit B, from any and all sources whatsoever, Lipman shall pay Presidential, on account of each unit of \$1,000.00 so loaned, 7% of all royalties so received, until said loan is repaid to Presidential, together with interest thereon at 5% per annum. As the intention of the parties that if Presidential advances \$2,000.00, he is to receive 10% of all royalties received by Lipman until said loan and interest thereon is repaid, and if Presidential advances \$2,000.00, he is to receive 10% of all such royalties until said loan and interest thereon is repaid. 3 - As further consideration for the financing of said loan, Lipman agrees to pay Presidential on account of each unit of \$1,000.00 so loaned, 2% of all royalties that it may receive or become entitled to on account of any and all license contracts, whether exclusive or non-exclusive, or any other agreements that it may enter into with RCA, covering the subject matter heretofore referred to, or involving any of the patents listed in Exhibit B for the life of the original agreement or agreements, and any renewals thereof. If Presidential advances \$2,000.00, he shall, under this paragraph, be entitled to 4% of all such royalties, and if he advances \$2,000.00, he shall be entitled to 2% of all such royalties. Such payment of 2% for each \$1,000.00 loaned shall be in addition to the repayment heretofore provided for in Paragraph 2, it being contemplated that if Presidential loans Lipman the sum of \$2,000.00, he shall be entitled to 2% of the R. C. A. royalties until said loan and interest thereon is repaid, and hereafter he shall be entitled to 2% of such RCA royalties. In the event that RCA fails to exercise its option for an exclusive license contract under Paragraph (a) of Section 8 of Exhibit A and no such exclusive license agreement is entered into, then Presidential, on account of each unit of \$1,000.00 so loaned, shall be entitled to 2% of any and all royalties that Lipman may receive or become entitled to on account of any and all license agreements involving any of the patents listed in Exhibit B or any other patents that Lipman may acquire in the air-conditioning and refrigeration fields, either for domestic or commercial use, hereinafter entered into by Lipman with any and all persons or corporations, including but not limited to any non-exclusive license agreements that it may enter into with RCA, either under Paragraph (b) of Section 8 of Exhibit A or otherwise, provided, however, that Presidential shall not be entitled to any royalties under this Paragraph 3 on account of any existing license agreements or on account of any licensing agreement that may be entered into in connection with the settlement of any present bona fide infringement claim. 4 - In further consideration of said loan by Presidential to Lipman, V. E. I. Lipman hereby unconditionally guarantees the payment of the principal loaned heretofore, and interest thereon at the rate of 5% per annum, unless otherwise repaid within two years from the date heretofore; and as evidence of said guarantee, D. C. I. Lipman hereby covenants and agrees to execute and sign personal judgment note or notes, payable on or before two years to Lipman. All payments by Lipman to Presidential under Paragraph 2 heretofore shall be endorsed on the appropriate note or notes of said



guarantor. 5 - Notwithstanding any payments by C. E. L. Lipman under his guarantee, it is hereby mutually agreed that the royalty arrangements hereinabove provided for all shall continue nevertheless; provided, however, that in the event that Lipman shall be unable to enter into any license agreement covering the subject matter now involved in said RCA negotiation, or covering any of its patents in the air-conditioning and refrigeration fields, within two years from and after the date of final repayment of said loan to Freudenthal, then upon expiration of said two year period, all rights of Freudenthal hereunder shall terminate, and Freudenthal shall execute such releases or assignment hereof as may be required by C. E. L. Lipman. 6 - Lipman covenants and agrees not to sell, assign or transfer, as security or otherwise, any of the patents or patent applications now owned or controlled by it during the lifetime of this agreement without first obtaining the consent of Freudenthal in writing. Lipman further agrees not to settle or compromise any royalty claims without first obtaining the consent of Freudenthal in writing, excepting claims against infringers or claims under present existing license agreements. 7 - Lipman agrees that it will hold in trust for Freudenthal the various royalty percentages to which Freudenthal may become entitled hereunder. Lipman further agrees to pay to Freudenthal on or before the 15th of each January, April, July and October during the life of this agreement, the royalties received during the preceding quarter that Freudenthal is entitled to hereunder, and agrees to furnish Freudenthal on or before said quarterly dates with a sworn statement, properly itemized, of the amount of royalties received by it in the preceding quarter. Lipman covenants and agrees to keep true and accurate books of account, and Freudenthal is hereby given the right to examine the books of the corporation personally, or through a duly authorized agent, at all reasonable times and at his own expense, and Lipman hereby agrees to cooperate with Freudenthal and to furnish all documents and information that may be required. 8 - In the event that Lipman receives any deposits or advances from any licensee to apply on royalties to be paid Lipman for the use of its patents for air-conditioning or refrigeration, then the percentages to be paid Freudenthal as set forth in Paragraphs 2 and 3 shall apply against all said deposits or advances, and shall be accounted for in the quarter that they are received. 9 - In the event Lipman sells, assigns or transfers any patents in violation of its covenants in Paragraph 6 hereof, then in such event, anything to the contrary hereinabove notwithstanding, any and all unpaid advances including the unpaid balances on C. E. L. Lipman's notes of guarantee shall immediately become due and payable, and Lipman and C. E. Lipman covenant and agree to pay to Freudenthal on demand the amount of such unpaid advances, together with interest thereon at 5%. In the event of any such breach of Paragraph 6, Freudenthal shall be further entitled, in addition to any and all rights under this contract, to a percentage of the monies or other property received by Lipman for such sale, assignment or transfer, equal to twice the total percentage of royalties to which Freudenthal may be entitled under Paragraph 3. Lipman covenants and agrees to hold in trust for Freudenthal such double percentage of monies or other property for any such sale, assignment or transfer. This Agreement shall be binding upon the heirs, executors and assigns of the parties hereto, and Lipman agrees to furnish Freudenthal with an appropriate corporate resolution, approving the execution of this agreement."



corporate resolution, approving the execution of this agreement."

and Lippman agrees to furnish Freudenthal with an appropriate  
binding upon the heirs, executors and assigns of the parties hereto,  
and such sale, assignment or transfer. This agreement shall be  
Freudenthal's double percentage of net sales or other property for  
Paragraph 3. Lippman covenants and agrees to hold in trust for  
percentage of royalties to which Freudenthal may be entitled under  
for each sale, assignment or transfer, equal to twice the total  
a percentage of the net sales or other property received by Lippman  
entitled, in addition to any and all rights under this contract, to  
event of any such breach of Paragraph 3, Freudenthal shall be further  
such unpaid advances, together with interest thereon at 5% in the  
covenant and agree to pay to Freudenthal on demand the amount of  
immediately becomes due and payable, and Lippman and C. E. Lippman  
the unpaid balance on C. E. Lippman's notes of guarantee shall  
hereinafter notwithstanding, any and all unpaid advances including  
in Paragraph 3 hereto, then in such event, anything to the contrary  
sole, assigns or transferees any patents in violation of its covenants  
for in the quarter that they are received. 9 - In the event Lippman  
apply against all said deposits or advances, and shall be accounted  
to be paid Freudenthal as set forth in Paragraphs 2 and 3 shall  
patents for air-conditioning or refrigeration, then the percentages  
license to apply on royalties to be paid Lippman for the use of the  
in the event that Lippman receives any deposits or advances from any  
to furnish all documents and information that may be required. 8 -  
expenses, and Lippman hereby agrees to cooperate with Freudenthal and  
a duly authorized agent, at all reasonable times and at his own  
right to examine the books of the corporation personally, or through  
and accurate books of account, and Freudenthal is hereby given the  
in the preceding quarter. Lippman covenants and agrees to keep true  
ment, properly itemized, of the amount of royalties received by it  
Freudenthal on or before said quarterly dates with a sworn state-  
that Freudenthal is entitled to hereunder, and agrees to furnish  
of this agreement, the royalties received during the preceding quarter  
the last of each January, April, July and October during the life  
under. Lippman further agrees to pay to Freudenthal on or before  
royalty percentages to which Freudenthal may become entitled here-  
agree that it will hold in trust for Freudenthal the various  
claims under present existing license agreements. 7 - Lippman  
of Freudenthal in writing, excepting claims against infringers or  
or otherwise my royalty claims without first obtaining the consent  
of Freudenthal in writing. Lippman further agrees not to settle  
lifetime of this agreement without first obtaining the consent  
assign or transfer, as security or otherwise, any of the patents  
or patent applications now owned or controlled by it during the  
by C. E. Lippman. 6 - Lippman covenants and agrees not to sell,  
shall execute such release or assignment hereto as may be required  
rights of Freudenthal hereunder shall terminate, and Freudenthal  
to Freudenthal, then upon expiration of said two year period, all  
two years from and after the date of final payment of said loan  
the patents in the air-conditioning and refrigeration fields, within  
master now involved in said RCA negotiation, or covering any of  
unable to enter into any license agreement covering the subject  
thereof; provided, however, that in the event that Lippman shall be  
arrangements hereinafter provided for all shall continue never-  
under his guarantee, it is hereby mutually agreed that the royalties  
guarantor. 5 - Notwithstanding any payments by C. E. Lippman

The supplemental agreement referred to in the petition, a copy of which was attached to the petition, reads:

"Supplemental Agreement made this 31st day of January, 1940 between Lipman Patents Corporation, a Delaware corporation, hereinafter called 'Lipman' and George S. Freudenthal, hereinafter called 'Freudenthal' and C. E. L. Lipman. Witnesseth, That, Whereas, on February 23, 1939, the parties hereto did enter into a certain agreement in connection with the financing of a proposed contract of Lipman with RCA Manufacturing Company, Inc., hereinafter called 'RCA'; and Whereas, at that time it was represented that the total of Lipman's liabilities, as of February 23, 1939, in connection with said RCA contract, was not in excess of \$2,600.00, and that Lipman was in need of funds, not in excess of \$6,000.00 to meet its obligations in connection with said proposed RCA contract, and to complete the samples and drawings relating thereto; and Whereas, Freudenthal does claim that Lipman's obligations in connection with said RCA contract, at such time, were in excess of \$2,600.00, so that the completion of said project has been delayed; and Whereas, a controversy has arisen between the parties, and the parties hereto are desirous of entering into a settlement thereof; Now, Therefore, it is agreed by and between the parties as follows: 1 - That in the event that RCA exercises its option for an exclusive license contract under subparagraph (a) of Section 8 of the RCA letter dated August 18, 1939 (copy of which letter is attached as Exhibit A to the agreement dated February 23, 1939), or in the event that any exclusive license contract is entered into by and between Lipman and RCA covering the subject matter of said letter, in either event Freudenthal shall be entitled to and Lipman shall pay to Freudenthal, as further consideration for the advance of \$3,000.00 which has been made by Freudenthal to Lipman, 3% of all royalties that Lipman may receive or become entitled to under or on account of each and every license contract involving the use of motor compressor units covered by patents owned by the company, concluding license agreements for commercial purposes as well as for household purposes, for the life of the original agreement or agreements and any renewals thereof; provided, however, that Freudenthal shall not have any interest, hereunder, if any royalties received on account of any license agreement for commercial purposes involving the use of motor compressor units of a horse power in excess of one and one-half h.p; and provided, further, that Freudenthal shall not be entitled to any royalties on account of any license agreement that may be entered into in connection with the settlement of any bona fide infringement claim, existing on February 23, 1939. 2 - The compensation provided for in Paragraph 1 hereof shall be in addition to the compensation to which Freudenthal is entitled to under the agreement dated February 23, 1939. 3 - Lipman agrees to hold all of said royalty percentages (including the additional royalty percentages provided for in Paragraph 1 hereof), in trust for Freudenthal and to make quarterly royalty statements and quarterly royalty payments, as provided in Paragraph 7 of the agreement dated February 23, 1939. 4 - It is the intention of the parties hereto that Freudenthal shall be deemed to own a 3% interest in the royalties to which Lipman may be entitled under any license contract on which royalties are payable by Lipman to Freudenthal, under Paragraph 1 hereof, even though such interest in said contract or contracts is not assigned to him; and that Freudenthal shall be deemed to own a 6% interest in the royalties to which Lipman may be entitled



The supplemental agreement referred to in the petition,

a copy of which was attached to the petition, reads:

"Supplemental Agreement made this first day of January, 1940 between Lipman Patents Corporation, a Delaware corporation, hereinafter called 'Lipman', and George D. Freundenthal, hereinafter called 'Freundenthal', and G. E. Lipman, Witness, that, hereinafter, the parties have entered into a certain agreement in connection with the financing of a proposed contract of Lipman with RCA Manufacturing Company, Inc., hereinafter called 'RCA'; and whereas, at that time it was represented that the total of Lipman's liabilities, as of February 22, 1939, in connection with said RCA contract, was not in excess of \$2,500.00, and that Lipman was in need of funds, not in excess of \$5,000.00, to meet the obligations in connection with said proposed contract, and to complete the same and drawings relating thereto; and whereas, Freundenthal does claim that Lipman's obligations in connection with said RCA contract, at such time, were in excess of \$2,500.00, so that the completion of said project has been delayed; and whereas, a controversy has arisen between the parties, and the parties have entered into a settlement of the controversy, it is agreed by and between the parties as follows: 1 - That in the event that RCA exercises its option for an exclusive license contract under paragraph (a) of Section 6 of the RCA letter dated August 18, 1939 (copy of which letter is attached as Exhibit A to the agreement dated February 22, 1939), or in the event that any exclusive license contract is entered into by and between Lipman and RCA covering the subject matter of said letter, in either event Freundenthal shall be entitled to and Lipman shall pay to Freundenthal, as further consideration for the advance of \$5,000.00 which has been made by Freundenthal to Lipman, 25% of all royalties that Lipman may receive or become entitled to under or on account of such and every license contract involving the use of motor compressor units covered by patents owned by the company, constituting license agreements for commercial purposes as well as for household purposes, for the life of the original agreement or agreements and renewals thereof; provided, however, that Freundenthal shall not have any interest, nevertheless, if any royalties received on account of any license agreement for commercial purposes involving the use of motor compressor units of a house power in excess of one and one-half h.p.; and provided, further, that Freundenthal shall not be entitled to any royalties on account of any license agreement that may be entered into in connection with the settlement of any bona fide interference claim, existing on February 22, 1939. 2 - The consideration provided for in Paragraph 1 hereof shall be in addition to the consideration to which Freundenthal is entitled to under the agreement dated February 22, 1939. 3 - Lipman agrees to hold all of said royalty percentages (including the additional royalty percentages provided for in Paragraph 1 hereof), in trust for Freundenthal and to make quarterly royalty statements and quarterly royalty payments, as provided in Paragraph 7 of the agreement dated February 22, 1939. 4 - It is the intention of the parties hereto that Freundenthal shall be deemed to own a 25% interest in the royalties to which Lipman may be entitled under any license contract on which royalties are payable by Lipman to Freundenthal, under Paragraph 1 hereof, even though such interest in said contract or contracts is not assigned to him; and that Freundenthal shall be deemed to own a 25% interest in the royalties to which Lipman may be entitled



under any contract for which royalty payments from Lipman to Freudenthal are provided for in the agreement dated February 23, 1939, even though such interest in said contract or contracts is not assigned to him; and Lipman hereby covenants and agrees to execute instruments of assignment to Freudenthal, at any time that Freudenthal may request, assigning and setting over to Freudenthal the 6% or 3% interest to which he may be entitled, as the case may be. 5 - Lipman agrees to keep Freudenthal advised at all times of pending license contract deals and of the terms thereof, and to furnish Freudenthal with a copy of any license contract entered into, in which Freudenthal has an interest, either by reason of this supplemental agreement or by reason of the agreement dated February 23, 1939. 6- Lipman represents that under the By-laws the president and secretary are authorized to sign, seal and deliver this contract for the corporation without resolution from the board of directors. 7 - This agreement shall be binding upon the heirs, executors and assigns of the parties hereto. 8 - In consideration of the foregoing, Freudenthal does hereby release, remise and forever discharge Lipman and C. E. L. Lipman, their heirs and executors and assigns, of any and all claims that he may have against them or either of them on account of the matters set forth in the preamble hereof."

The agreement and supplemental agreement are sealed. The note dated February 23, 1939 contains endorsements showing the payment of \$200.00 on March 26, 1941 and \$100.00 on April 8, 1941. Evidently these endorsements were made by plaintiff, as his initials appear after each date.

The first point advanced by defendant is that on a motion to vacate a judgment by confession it is no part of the court's function to decide issues of fact, but solely to determine whether the motion to vacate the judgment and the petition in support thereof, raise an issue of fact to be tried. Plaintiff does not oppose this contention, but urges that a defendant seeking to vacate a judgment by confession must allege facts showing clearly that he has a meritorious defense, the court not being bound to take the mere conclusions of the pleader as true. We accept these statements of the law by the respective parties as substantially correct.

The second point urged by defendant is that as between the immediate parties, delivery of promissory notes may be shown to have been conditional or for a special purpose only and for the purpose of transferring the property in the instrument. This also

under any contract for which royalty payments from Lipman to  
Frendenthal are provided for in the agreement dated February 23,  
1933, even though such interest in said contract or contracts is  
not assigned to him; and Lipman hereby covenants and agrees to  
execute instruments of assignment to Frendenthal, at any time that  
Frendenthal may request, assigning and setting over to Frendenthal  
the 5% or 10% interest to which he may be entitled, as the case  
may be. 5 - Lipman agrees to keep Frendenthal advised of all  
losses of pending license contracts made and of the terms thereof,  
and to furnish Frendenthal with a copy of any license contract  
entered into, in which Frendenthal has an interest, either by  
reason of this supplemental agreement or by reason of the agreement  
dated February 23, 1933. 6 - Lipman represents that under the by-  
laws the president and secretary are authorized to sign, seal and  
deliver this contract for the corporation without resolution from the  
board of directors. 7 - This agreement shall be binding upon the  
heirs, executors and assigns of the parties hereto. 8 - In  
consideration of the foregoing, Frendenthal does hereby release,  
remise and forever discharge Lipman and G. E. Lipman, their  
heirs and executors and assigns, of any and all claims that he may  
have against them or either of them on account of the matters set  
forth in the preamble hereto."

The agreement and supplemental agreement are sealed. The note dated  
February 23, 1933 contains endorsements showing the payment of  
\$200.00 on March 25, 1941 and 100.00 on April 8, 1941. Additionally  
these endorsements were made by plaintiff, as his initials appear  
after each date.

The first point advanced by defendant is that on a motion  
to vacate a judgment by confession it is no part of the court's  
function to decide issues of fact, but solely to determine whether  
the motion to vacate the judgment and the petition in support thereof,  
raise an issue of fact to be tried. Plaintiff does not oppose this  
contention, but urges that a defendant seeking to vacate a judgment  
by confession must allege facts showing clearly that he has a  
meritorious defense, the court not being bound to take the mere  
contentions of the pleader as true. We accept these statements of  
the law by the respective parties as substantially correct.

The second point urged by defendant is that as between  
the local parties, delivery of promissory notes may be shown  
to have been conditional or for a special purpose only and for the  
purpose of transferring the property in the instrument. This also



appears to be a correct statement as to the law. The court in passing on defendant's motion necessarily considered the allegations of fact in the petition and the provisions of the agreement and supplemental agreement. It is undisputed that plaintiff loaned the Lipman Patents Corporation \$3,000.00, and that to evidence this loan defendant executed the three notes. Defendant was the president and chief stockholder of the corporation. Hence, he was in a position to be acquainted with all the relevant facts. His petition did not deny that on March 26, 1941 \$200. was paid on the note and that on April 8, 1941 \$100.00 was paid on the note. It is reasonable to infer that these payments were made by or on behalf of the corporation. At the time of such payments the defendant apparently believed that the notes were valid obligations. We find that the defendant has failed to make any showing that the notes were delivered for some purpose other than that of transferring them. The purpose of having defendant sign the notes was to guarantee their unconditional payment by him, unless such notes should otherwise be paid within two years from their respective dates. Defendant maintains that the notes were to become his obligation only in the event the corporation failed to faithfully perform its obligations under its contract with plaintiff dated February 23, 1939. We cannot agree with this contention.

Finally, defendant asserts that the "release and discharge of the defendant by the plaintiff of his obligation as guarantor under the contract of February 23, 1939, pursuant to which the judgment notes in question were executed, nullified and destroyed the special interest of plaintiff in said notes and the authority contained in said notes to confess judgment." There is no doubt that the release and discharge of the defendant by the plaintiff of his obligation as a guarantor would prevent plaintiff from causing a judgment to be confessed on the notes. This contention



appears to be a correct statement as to the law. The court in passing on defendant's motion necessarily considered the allegations of fact in the petition and the provisions of the agreement and supplemental agreement. It is undisputed that plaintiff loaned the Lipman Patents Corporation \$3,000.00, and that to evidence this loan defendant executed the three notes. Defendant was the president and chief stockholder of the corporation. Hence, he was in a position to be acquainted with all the relevant facts. His petition did not deny that on March 26, 1941 \$200.00 was paid on the note and that on April 8, 1941 \$100.00 was paid on the note. It is reasonable to infer that these payments were made by or on behalf of the corporation. At the time of such payments the defendant apparently believed that the notes were valid obligations. We find that the defendant has failed to make any showing that the notes were delivered for some purpose other than that of transferring them. The purpose of having defendant sign the notes was to guarantee their unconditional payment by him, unless such notes should otherwise be paid within two years from their respective dates. Defendant maintains that the notes were to become his obligation only in the event the corporation failed to faithfully perform its obligations under its contract with plaintiff dated February 23, 1939. We cannot agree with this contention.

Finally, defendant asserts that the "release and discharge of the defendant by the plaintiff of his obligation as guarantor under the contract of February 23, 1939, pursuant to which the judgment notes in question were executed, nullified and destroyed the special interest of plaintiff in said notes and the authority contained in said notes to confer judgment." There is no doubt that the release and discharge of the defendant by the plaintiff of his obligation as a guarantor would prevent plaintiff from causing a judgment to be confessed on the notes. This contention

rests upon the assumption that defendant was released and discharged by the express provisions of the supplemental agreement of January 31, 1940. Paragraph 8 of this agreement reads: "In consideration of the foregoing, Freudenthal does hereby release, remise and forever discharge Lipman and C. E. L. Lipman, their heirs and executors and assigns, of any and all claims that he may have against them or either of them on account of the matters set forth in the preamble hereof". It is apparent from the recitals of the supplemental agreement that the parties intended to settle plaintiff's claim that the financial condition of the corporation had been misrepresented to him. In construing a release and determining the intent thereof, the entire instrument must be examined. Each clause and provision is to be read in the light of all provisions and recitals. We are satisfied that the court correctly decided that the language of Paragraph 8 of the supplemental agreement did not and was not intended to release the defendant from his obligation to pay the three notes on which judgment was confessed. The record is free from error, and the order of the Circuit Court of Cook County is affirmed.

ORDER AFFIRMED.

KILEY, J. CONCURS.

HEBEL, P.J. TOOK NO PART.

rests upon the assumption that defendant was released and discharged by the express provisions of the supplemental agreement of January 31, 1940. Paragraph 8 of this agreement reads: "In consideration of the foregoing, Fremontshall does hereby release, remise and forever discharge Lipman and G. E. L. Lipman, their heirs and executors and assigns, of any and all claims that he may have against them or either of them on account of the matters set forth in the preamble hereto". It is apparent from the recitals of the supplemental agreement that the parties intended to settle plaintiff's claim that the financial condition of the corporation had been misrepresented to him. In construing a release and determining the intent thereof, the entire instrument must be examined. Each clause and provision is to be read in the light of all provisions and recitals. We are satisfied that the court correctly decided that the language of Paragraph 8 of the supplemental agreement did not and was not intended to release the defendant from his obligation to pay the three notes on which judgment was confessed. The record is free from error, and the order of the Circuit Court of Cook County is affirmed.

ORDER AFFIRMED.

KILLY, J. CONCURS.  
REBEL, F. J. TOOK NO PART.



42818

320 I.A. 682

DONALD RIECK,

Appellee,

v.

BENJAMIN BARSEMA,

Defendant,

THOMAS M. MADDEN COMPANY, a corporation,

Intervening Petitioner.

On Appeal of THOMAS M. MADDEN COMPANY, a corporation,

Intervening Petitioner.

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Donald Rieck filed a replevin suit before a justice of the peace to recover an automobile from Benjamin Barsema. The constable to whom the writ was delivered took possession of the automobile from the defendant and delivered it to the plaintiff. The case was called for trial on March 4, 1943. Defendant did not appear and was defaulted. Thomas M. Madden Company, a corporation, filed an intervening claim that it was entitled to possession of the automobile. On the trial of the issue as to whether Rieck, the defendant, or Thomas M. Madden Company, the intervenor, was entitled to possession of the automobile, the justice of the peace found for the plaintiff and entered judgment accordingly. Thereupon, the intervenor prayed an appeal, which was allowed. The appeal bond was fixed at the sum of \$900.00. On March 15, 1943 the intervenor presented an appeal bond in the sum of \$900.00, with the Century Indemnity Company, as surety, to the justice of the peace and paid the appeal fees to the justice for an appeal to the Circuit Court of Cook

3201A.682

43813

CONRAD NIECK

Appellant

v.

THOMAS M. HADDEN COMPANY

Defendant

THOMAS M. HADDEN COMPANY, a corporation,  
Plaintiff

Intervening Plaintiff

On Appeal of THOMAS M. HADDEN COMPANY,  
Plaintiff, a corporation,

Intervening Plaintiff

Appellant

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

CONRAD NIECK filed a petition with the Justice of

The peace to recover an automobile from Benjamin Hadden. The automobile to whom the writ was delivered took possession of the automobile from the defendant and delivered it to the plaintiff. The case was called for trial on March 4, 1943. Defendant did not appear and was defaulted. Thomas M. Hadden Company, a corporation, filed an intervening claim that it was entitled to possession of the automobile. On the trial of the issue as to whether Nieck, the defendant, or Thomas M. Hadden Company, the intervenor, was entitled to possession of the automobile, the Justice of the peace found for the plaintiff and entered judgment accordingly. Thereupon, the intervenor prayed an appeal, which was allowed. The appeal bond was fixed at the sum of \$200.00. On March 15, 1943 the intervenor presented an appeal bond in the sum of \$200.00, with the Century Indemnity Company, as surety, to the Justice of the peace and paid the appeal fees to the Justice for an appeal to the Circuit Court of Cook

County. On the same day the justice took and approved the Bond. On March 23, 1943 the justice filed his transcript and intervenor's appeal bond with the Clerk of the Circuit Court of Cook County. On March 29, 1943 the intervenor filed its trial notice in the Circuit Court, seeking an immediate trial. On April 26, 1943 plaintiff filed his general appearance, and on the same day there was filed, by oral leave of court, the justice's complete file. On the same day plaintiff also filed a written motion to withdraw his general appearance and to file in lieu thereof a special and limited appearance "for the sole and only purpose of questioning the jurisdiction of the court to hear this appeal." Plaintiff also filed his written motion to dismiss the appeal for want of jurisdiction for the reason that "the intervenor in this suit, Thomas M. Madden Company did not file an appeal bond as required by statute in cases of appeal from justices of the peace." The record does not show that any ruling was made on the motion for leave to withdraw the general appearance. On May 10, 1943, by oral leave of court, the justice of the peace filed his verified petition, stating that on March 4, 1943 plaintiff's replevin suit was called for trial before him; that before the commencement of the trial the intervening petition was filed; that various witnesses were sworn and testified on behalf of intervenor; that there was a finding for plaintiff; that intervenor prayed an appeal; that the bond was fixed at \$900.00; that on March 15, 1943 the intervenor presented to him an appeal bond with good and sufficient surety; that the appeal bond was taken and approved by him on March 15, 1943; that because of his clerical error the date of the approval on the face of the bond was written as March 12, 1943 instead of March 15, 1943; that the bond, together with the transcript of the proceedings, were filed by him



County. On the same day the Justice took and approved the bond. On March 23, 1943 the Justice filed his transcript and intervenor's appeal bond with the Clerk of the Circuit Court of Cook County. On March 23, 1943 the intervenor filed his trial notice in the Circuit Court seeking an immediate trial. On April 28, 1943 plaintiff filed his general appearance, and on the same day there was filed, by oral leave of court, the Justice's complete file. On the same day plaintiff also filed a written motion to withdraw his general appearance and to file in lieu thereof a special and limited appearance "for the sole and only purpose of questioning the jurisdiction of the court to hear this appeal." Plaintiff also filed his written motion to dismiss the appeal for want of jurisdiction for the reason that "the intervenor in this suit, Thomas M. Madigan Company did not file an appeal bond as required by statute in cases of appeal from Justice of the Peace." The record does not show that any ruling was made on the motion for leave to withdraw the general appearance. On May 10, 1943, by oral leave of court, the Justice of the Peace filed his verified petition, stating that on March 4, 1943 plaintiff's reply was filed and that before the commencement of the trial the intervenor's petition was filed; that various witnesses were sworn and testified on behalf of intervenor; that there was a finding for plaintiff; that intervenor prayed an appeal; that the bond was fixed at \$500.00; that on March 18, 1943 the intervenor presented to him an appeal bond with good and sufficient surety; that the appeal bond was taken and approved by him on March 18, 1943; that because of his clerical error the date of the approval on the face of the bond was written as March 12, 1943 instead of March 18, 1943; that the bond, together with the transcript of the proceedings, were filed by him

with the Clerk of the Circuit Court on March 23, 1943; and the justice prayed for leave to correct the date of his approval on the face of the appeal bond to read March 15, 1943 in lieu of March 12, 1943 and to file a supplemental docket of his transcript and proceedings in the appeal. Pursuant to oral permission given, the justice filed his complete transcript. On May 10, 1943 the court entered an order that the intervenor's petition be dismissed "for want of jurisdiction," to reverse which intervenor prosecutes this appeal. Plaintiff (appellee) did not file an appearance or briefs in this court.

Under the practice in this State the Thomas M. Madden Company had a clear right to intervene and it intervened in due time. Appeals from justices of the peace are governed by Sec. 116, Ch. 79, Ill. Rev. Stat. 1941. The appeal was prayed, the bond was filed and the appeal fees paid within 20 days from the date the judgment was rendered. This was in accordance with the statute. The justice of the peace filed the appeal bond and transcript in the office of the Clerk of the Circuit Court in apt time. The transcript of the justice and the record of the Circuit Court show compliance with all of the requisite steps for perfecting an appeal. The justice made a clerical error in writing on the face of the bond that it was taken and approved by him on March 12, 1943 instead of March 15, 1943, the true date. This was an error by the justice, over which the intervenor had no control. There is no statutory requirement that the justice approve the bond on its face. The transcript shows the proceedings before the justice and recites that he took and approved the bond on March 15, 1943. We presume that the appeal was dismissed for the reason that the justice erroneously showed on the face of the bond that it was taken and approved on March 12, 1943 instead of March 15, 1943. As the transcript shows that an appeal was prayed, that the bond was taken and approved, that the appeal fees were paid



With the Clerk of the Circuit Court on March 22, 1943; and the Justice prayed for leave to correct the date of his approval on the face of the appeal bond to read March 18, 1943 in lieu of March 15, 1943 and to file a supplemental docket of his transcript and proceedings in the appeal. Pursuant to oral permission given, the Justice filed his complete transcript. On May 10, 1943 the court entered an order that the intervenor's petition be dismissed "for want of jurisdiction," to reverse which intervention constitutes this appeal. Plaintiff (appellee) did not file an appearance or brief in this court.

Under the practice in this State the Thomas M. Madden Company had a clear right to intervene and it intervened in due time. Appeals from Justices of the Peace are governed by Sec. 116, Ch. 75, III. Rev. Stat. 1941. The appeal was prayed, the bond was filed and the appeal fees paid within 30 days from the date the judgment was rendered. This was in accordance with the statute. The Justice of the Peace filed the appeal bond and transcript in the office of the Clerk of the Circuit Court in apt time. The transcript of the Justice and the record of the Circuit Court show compliance with all of the requisite steps for perfecting an appeal. The Justice made a clerical error in writing on the face of the bond that it was taken and approved by him on March 12, 1943 instead of March 15, 1943, the true date. This was an error by the Justice, over which the intervenor had no control. There is no statutory requirement that the Justice approve the bond on its face. The transcript shows the proceedings before the Justice and recites that he took and approved the bond on March 15, 1943. We presume that the appeal was dismissed for the reason that the Justice erroneously showed on the face of the bond that it was taken and approved on March 12, 1943 instead of March 15, 1943. As the transcript shows that an appeal was prayed, that the bond was taken and approved, that the appeal fees were paid



and that the transcript and bond were filed in the office of the Clerk of the Circuit Court in apt time, it was error to dismiss the appeal.

Furthermore, the general appearance filed by the attorneys for plaintiff in the Circuit Court waived all right to object to the jurisdiction of that court on the ground of informality in the appeal bond.

Because of these views, the judgment of the Circuit Court of Cook County dismissing the appeal of the Thomas M. Madden Company, a corporation, is reversed and the cause remanded with directions to reinstate the appeal and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS

HEBEL, P.J., TOOK NO PART  
KILEY, J, CONCURS

and that the transcript  
the office of the Clerk of the Circuit Court in this case, it  
was error to dismiss the appeal.

Furthermore, the Federal appearance filed by the attorney  
for plaintiff in the Circuit Court waived all rights to object  
to the jurisdiction of that court on the ground of irregularity in  
the appeal bond.

Because of these views, the judgment of the Circuit Court  
of Cook County dismissing the appeal of the Thomas W. Nathan  
Company, a corporation, is reversed and the case remanded with  
directions to reinstate the appeal and for further proceedings  
not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS

RECEIVED, P. J., TOOK NO PART  
KILBY, J., CONCURS

42211

320 I.A. 682<sup>2</sup>

WILLIAM H. GRAY, etc. RALPH B. GRAY,  
individually and as administrator  
de bonis non with Will annexed of the  
Estate of Orpha Ellen Buckingham Gray  
and as Executor of the Estate of  
William H. Gray; WILLIAM B. GRAY,

Plaintiffs and Counter-Defendants,

Appellants,

v.

THE FIRST NATIONAL BANK OF CHICAGO, a  
national banking association,

Defendant and Counter Claimant,

Appellee,

INA GRAY COOK,

Defendant and Counter Defendant,

Appellant,

JOHN J. AMES,

Intervening Petitioner,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to remove clouds upon and quiet title to real estate; and a counter claim to recover on a note and to fore-close certain pledged mortgages. We shall refer to plaintiffs and counter defendants as the Grays; to First National Bank of Chicago, as First National; to Federal Land Bank of Houston as Federal Bank; to the Vega National Farm Loan Association as the Association; and to the Federal Farm Mortgage Corporation bonds as bonds.

Decree, in favor of First National Bank of Chicago on the complaint and its counter claim, was based on the pleadings since no evidence was heard. The trial court sustained First National's motion for decree under section 45 of the Civil Practice Act.



3201A.332

4201

WILLIAM E. GRAY, etc., PLAINTIFFS,  
INDIVIDUALLY AND AS ADMINISTRATOR  
OF THE ESTATE OF GEORGE ALLEN HUGHES GRAY,  
DECEASED, AS EXECUTOR OF THE ESTATE OF  
WILLIAM E. GRAY, WILLIAM E. GRAY,

PLAINTIFFS AND COUNTER-DEFENDANTS,  
v.  
THE FIRST NATIONAL BANK OF CHICAGO, a  
national banking association,

DEFENDANT AND COUNTER-DEFENDANT,  
APPELLEE,

IN A DEED BOOK,

DEFENDANT AND COUNTER-DEFENDANT,  
APPELLANT,

JOHN D. GRAY,

INTERVENING PETITIONER,

APPELLANT.

MR. JUSTICE KILBY DELIVERED THE OPINION OF THE COURT.

This is an action to remove clouds upon and quiet title to  
real estate; and a counter claim to recover on a note and to fore-  
close certain pledged mortgages. We shall refer to plaintiffs  
and counter defendants as the Grays; to First National Bank of  
Chicago, as First National; to Federal Land Bank of Houston as  
Federal Bank; to the Vega National Farm Loan Association as the  
Association; and to the Federal Farm Mortgage Corporation bonds as  
bonds.

Verdict in favor of First National Bank of Chicago on the  
complaint and its counter claim, was based on the findings since  
no evidence was heard. The trial court sustained First National's  
action for recovery under section 40 of the Civil Practice Act.

Ralph Gray, individually and as administrator and executor, William B. Gray and Ina Gray Cook appeal from the decree entered December 19, 1941, asking for a retrial on the merits, or decree in their favor; Ames appeals from an order denying the prayer of his petition to vacate the decree as to Ina Cook.

We have extricated the facts from more than 400 pages of pleadings, decree, motions, counter motions, etc. William H. and Orpha B. Gray, his wife, June 30, 1931, made a demand note payable to First National for \$65,000, secured by mortgages, face value of which were \$73,000, on Chicago real estate. Mrs. Gray died October 4, 1931, devising to her sons Ralph and William B. and her daughter Ina Gray Cook, Illinois real estate designated as Woodford Farm. January 16, 1933, First National's claim based on the note was allowed against Mrs. Gray's estate in the Probate Court of Cook County for \$71,218.34. About February 1, 1933, First National demanded payment of William H. Gray, who was unable to pay. Thereafter, he delivered to First National a \$45,000 mortgage on his Texas land upon which on September 18, 1933, he filed an application with the Federal Land Bank of Houston, Texas for a \$50,000 loan. The loan was made and First National received in lieu of the Texas mortgage, bonds and cash amounting to somewhat less than \$42,000. The bonds were sold by First National at Gray's direction and the proceeds applied on the \$65,000 note.

First National is endeavoring now to enforce payment of the balance due on the \$65,000 note against Ralph B. and William B. Gray and Ina Cook, as devisees of Woodford Farm against Ralph B., as administrator of his mother's estate and executor of his father's estate, and to foreclose the Chicago real estate mortgages held as collateral. The decree found the equities in favor of First National, and against the Grays and Mrs. Cook, and dismissed the complaint for want of equity; ordered that First National recover from Ralph B.



Ralph Gray, individually and as administrator and executor, William B. Gray and the Gray Cook appeal from the decree entered December 10, 1941, asking for a retrial on the merits, or decree in their favor; also appeals from an order denying the prayer of his petition to vacate the decree as to the Cook.

We have explained the facts from more than 400 pages of pleadings, decrees, motions, counter motions, etc. William B. and Thomas B. Gray, his wife, June 30, 1931, made a demand note payable to First National for \$25,000, secured by mortgages, two value of which were \$75,000, on Chicago real estate. Mrs. Gray died October 4, 1931, leaving to her sons Ralph and William B. and her daughter the Gray Cook, Illinois real estate designated as Woodford farm. January 16, 1933, First National's claim based on the note was allowed against Mrs. Gray's estate in the Probate Court of Cook County for \$71,218.34. About February 1, 1933, First National demanded payment of William B. Gray, who was unable to pay. Thereafter, he delivered to First National a \$45,000 mortgage on his Texas land upon which on September 18, 1933, he filed an application with the Federal Land Bank of Houston, Texas for a \$50,000 loan. The loan was made and First National received in lieu of the Texas mortgage, bonds and cash amounting to somewhat less than \$48,000. The bonds were sold by First National at Gray's direction and the proceeds applied on the \$25,000 note. First National is endeavoring now to enforce payment of the balance due on the \$25,000 note against Ralph B. and William B. Gray and the Cook, as devisees of Woodford farm against Ralph B., as administrator of his mother's estate and executor of his father's estate, and to foreclose the Chicago real estate mortgages held as collateral. The decree found the equities in favor of First National, and against the Grays and Mrs. Cook, and dismissed the complaint for want of equity; ordered that First National recover from Ralph B.



and William B. Gray and Ina Gray Cook \$20,666.67, as devisees under sections 10, 11, 12, 13 and 14 of the Statute of Frauds and Perjuries; that First National recover from Ralph B., as executor of the estate of William H. Gray, \$33,180.92, to be paid in due course as a 7th class claim; and ordered that First National's claim against Mrs. Gray's estate to the extent of \$33,180.92 should be satisfied by a sale of Woodford Farm and directed Ralph B. to obtain leave for such sale. It found that First National had a right to foreclose the Chicago real estate mortgages, limiting, however, its recovery to the balance of \$33,180.92 due on the note; ordered the Grays to pay said sum within three days or the real estate to be sold; and directed that all remedies under the decree might be pursued with but one satisfaction.

A special appearance was filed December 22, 1941, by Attorney Ames for Weinberg, Kjellander, O'Farrell & Ames on behalf of Ina Cook limited to the filing and prosecuting of an intervening petition to vacate the decree. The record shows that the firm as her attorneys stipulated twice to extend the time for First National to plead. Those acts imply a right in the proceeding and a <sup>readmission</sup> ~~revocation~~ of the court's power over the case. Mitchell v. Jacobs, 17 Ill. 234; Tagert v. Fletcher, 232 Ill. 197; Kelly v. Brown, 310 Ill. 319. Since the petition to vacate adopted Grays' petition of December 29, attacking the decree on grounds other than jurisdictional, the court's power was again recognized. 3 Cyc. 509; People for use of White v. White, 263 Ill. App. 425. This conduct constituted her appearance and while no stipulation was signed after First National counter claimed - the decree erroneously found the firm signed the January 19, 1940 stipulation - no new process was necessary against those in the case. Fleece v. Russell, 13 Ill. 32. If she was in the case by reason of the prior stipulations, she is in it for all purposes. The trial court refused to grant a hearing on the petition to vacate, although urged to do so by both sides. We need not comment on the attitude of the trial court since the petition does not disclose any reason for granting the relief

and William B. Gray and Mrs Gray Cook 30,686.87, as devisees under sections 10, 11, 12, 13 and 14 of the Statute of Wills and Bequests; that First National recover from Ralph B., as executor of the estate of William B. Gray, 33,180.92, to be paid in due course as a 7th class claim; and ordered that First National's claim against Mrs. Gray's estate to the extent of 33,180.92 should be satisfied by a sale of Woodford Farm and directed Ralph B. to obtain leave for such sale. It found that First National had a right to foreclose the Chicago real estate mortgages, limiting, however, its recovery to the balance of 33,180.92 due on the note; ordered the Grays to pay said sum within three days of the real estate to be sold; and directed that all remedies under the decree might be pursued with but one satisfaction. A special appearance was filed December 22, 1941, by Attorney Ames for Weinberg, Kjellander, O'Farrell & Ames on behalf of Mrs Cook limited to the filing and prosecuting of an intervening petition to vacate the decree. The record shows that the firm as her attorneys stipulated twice to extend the time for First National to plead. Those acts imply a right in the proceeding and a revocation of the court's power over the case. Mitchell v. Jacobs, 17 Ill. 234; Larzel v. Fletcher, 233 Ill. 107; Kelly v. Brown, 310 Ill. 319. Since the petition to vacate adopted Grays' petition of December 22, attacking the decree on grounds other than jurisdictional, the court's power was again recognized. 3 Cyc. 302; People for use of White v. White, 263 Ill. App. 425. This conduct constituted her appearance and while no stipulation was signed after First National counter claimed - the decree erroneously found the firm signed the January 19, 1940 stipulation - no new process was necessary against those in the case. Fleese v. Marshall, 13 Ill. 32. If she was in the case by reason of the prior stipulations, she is in it for all purposes. The trial court refused to grant a hearing on the petition to vacate, although urged to do so by both sides. A need not comment on the attitude of the trial court since the petition does not disclose any reason for granting the relief



sought. There is, consequently, no question of violation of due process, nor deprivation of Ina Cook's right to trial by jury, demanded in the law case, for equity jurisdiction having attached, it embraces all the subject matter of the law suit.

Plaintiff's complain that the trial court erred in vacating an order granting them a change of venue. Counsel for First National cooperated with plaintiff's counsel in obtaining the change. The complaint was filed October 25, 1939 and thereafter a motion to restrain the legal proceeding was denied; plaintiffs asked for a reference; issues were joined on the pleadings; First National moved for a decree on the pleadings and plaintiffs were given leave to file objections and a hearing set thereon; objections and counter motions for decree filed by plaintiffs and a new date set for hearing; and the court said it had studied the matter under advisement and was ready to decide it. The petition was not timely and the court did not commit error in vacating the order granting the change of venue.

Flassig v. Newman, 317 Ill. App. 635.

The disputes on the merits refer to the understanding between Gray and First National on the Texas mortgage, to the loan transaction with the Federal Land Bank of Houston, and to the acceptance of the Farm Mortgage bonds of First National.

First National says its motion is based on section 45, subparagraph 1, Civil Practice Act, since the pleadings and exhibits were insufficient and presented no triable issue of fact; and plaintiffs say well-pleaded facts admitted by the motion present fact issues. A motion under section 45 tenders a question of law on facts well-pleaded. Wittbold v. Chicago, 371 Ill. 94. First National answered the complaint. The answer was on file and not withdrawn when the motion based on insufficiency of the pleadings was made. Plaintiffs point out, and we agree, that under the circumstances First National waived its right to attack for insufficiency. The parties refer to the motion as one for insufficiency and as for a summary decree. Motions for summary



sought. There is, consequently, no question of violation of due process, nor deprivation of the Gook's right to trial by jury, demanded in the law case, for equity jurisdiction having attached, it embraces all the subject matter of the law suit.

Plaintiff's complaint that the trial court erred in vacating an order granting them a change of venue. Counsel for First National cooperated with plaintiff's counsel in obtaining the change. The complaint was filed October 25, 1938 and thereafter a motion to restrain the legal proceeding was denied; plaintiff asked for a reference; issues were joined on the pleadings; First National moved for a decree on the pleadings and plaintiff's were given leave to file objections and a hearing set thereon; objections and counter motions for decree filed by plaintiff and a new date set for hearing; and the court said it had studied the matter under advisement and was ready to decide it. The petition was not timely and the court did not commit error in vacating the order granting the change of venue.

Plaintiff v. Defendant, 371 Ill. App. 325.

The disputes on the merits refer to the understanding between Gray and First National on the Texas mortgage, to the loan transaction with the Federal Land Bank of Houston, and to the acceptance of the Texas mortgage bonds of First National.

First National says its motion is based on section 45, sub-paragraph 1, Civil Practice Act, since the pleadings and exhibits were insufficient and presented no triable issue of fact; and plaintiff says well-pleaded facts admitted by the motion present fact issues. A motion under section 45 tenders a question of law on facts well-pleaded. Hittold v. Chicago, 371 Ill. 94. First National answered the complaint.

The answer was on file and not withdrawn when the motion based on insufficiency of the pleadings was made. Plaintiff's brief out, and we agree, that under the circumstances First National waived its right to attack for insufficiency. The parties refer to the motion as one for insufficiency and as for a summary decree. Motions for summary

decrees were not available under the Act until January 1, 1942. Technically, therefore, a motion under section 45 or section 57 of the Civil Practice Act should not have been sustained. We believe, however, that the pleadings and exhibits presented a question of law with exhibits controlling allegations respecting the exhibits. Wood v. First National, 314 Ill. App. 340. We have disregarded names and have examined the record to determine whether the decree was erroneously entered. Some findings in the decree are erroneous. If, however, there are enough correct findings supported by the record and sufficient to sustain the decree, we shall affirm the decision of the trial court provided we are convinced there is no necessity for trying questions of fact.

Grays contend that the consideration for delivery of the Texas mortgage was an advancement to W. H. Gray of \$10,000 by First National. First National's letter of February 3, 1933, indicates that it was to loan the \$10,000 and as security therefor and as additional security for the \$65,000 note, the mortgage was to be given; that the loan was to pay delinquent taxes on the Chicago property securing the principal debt; that Gray was to continue his efforts to sell the Chicago and Texas real estate and apply the proceeds of any such sale on the principal debt; and that First National would forbear suing on the principal note if interest was properly paid. Its letter of March 30, 1933 acknowledged delivery of the Texas mortgage and stated that, on receipt of opinion that the mortgage was a valid lien, it would proceed in accordance with its February letter, otherwise the mortgage to be canceled upon Gray repaying an \$1,000 advance. The February letter plus the delivery of the mortgage by Gray soon thereafter, clearly indicates that the Texas mortgage was additional collateral for the \$65,000 note. The second letter seems to limit the consideration for the mortgage to the \$10,000 loan and, clearly, First National agreed to release the mortgage if not a valid first lien upon receiving repayment of the \$1,000 which is admitted. First



degrees were not available under the Act until January 1, 1947. Technically, therefore, a motion under section 45 or section 57 of the Civil Practice Act should not have been sustained. We believe, however, that the pleadings and exhibits presented a question of law with exhibits controlling allegations respecting the exhibits. Wood v. First National, 314 Ill. App. 340. We have disregarded names and have examined the record to determine whether the degree was erroneously entered. Some findings in the degree are erroneous. If, however, there are enough correct findings supported by the record and sufficient to sustain the degree, we shall affirm the decision of the trial court provided we are convinced there is no necessity for trying questions of fact.

Gray contended that the consideration for delivery of the Texas mortgage was an advancement to W. R. Gray of \$10,000 by First National. First National's letter of February 3, 1933, indicates that it was to loan the \$10,000 and as security therefor and as additional security for the \$5,000 note, the mortgage was to be given; that the loan was to pay delinquent taxes on the Chicago property securing the principal debt; that Gray was to continue his efforts to sell the Chicago and Texas real estate and apply the proceeds of any such sale on the principal debt; and that First National would forebear suing on the principal note if interest was properly paid. Its letter of March 30, 1933 acknowledged delivery of the Texas mortgage and stated that, on receipt of opinion that the mortgage was a valid lien, it would proceed in accordance with its February letter, otherwise the mortgage to be canceled upon Gray repaying an \$1,000 advance. The February letter plus the delivery of the mortgage by Gray soon thereafter, clearly indicates that the Texas mortgage was additional collateral for the \$5,000 note. The second letter seems to limit the consideration for the mortgage to the \$10,000 loan and, clearly, First National agreed to release the mortgage if not a valid lien upon receiving repayment of the \$1,000 which is admitted. First



National says that Gray did not demand the release and that, had he done so, its forbearance to sue would have ended and its several remedies be revived and since Gray was admittedly unable to pay, it could have proceeded against him and forced a sale of the Texas land. A letter dated November 13, 1934, after the Federal Bank Loan was consummated and the proceeds thereof distributed, written and signed by W. H. Gray and altered and signed by Ralph B. Gray, an attorney, states that First National holds the Texas mortgage as part security for the principal debt; and authorized and instructed First National to sell the bonds and apply the proceeds on the principal debt. We believe these three letters and fair inferences, clearly disclose that while the Grays had the right originally to a release of the mortgage, they considered it advantageous not to demand a release and finally in good faith directed First National to apply the proceeds on the principal debt and so waived objections they might otherwise have made.

Grays say the loan was made to liquidate the principal debt under a scale down agreement by First National. In the application the purpose was said to be the refinancing of a \$47,500 debt, \$45,000 of which was a mortgage, and the balance to be used to liquidate all other debts. Debts to First National were listed as the mortgage and \$20,000, later classified as "notes payable to banks." The application indicates that Gray may have hoped or planned, or understood that the \$20,000 was to be liquidated with \$2,500. The application, however, is not binding on First National, since it is not a party, and we cannot find it knew of the contents; and later events altered the terms of the application. In a "Consent and Agreement" executed April 4, 1934, as a prerequisite to the loan, First National stated that \$45,000 was the unpaid principal debt and agreed to accept \$42,500 in satisfaction. The mortgage was never reduced to a debt of First National, although it acknowledged receipt of bonds as legal owner but only after being authorized to do so by the loaning agency. The agreement was sent to the Federal Bank in a letter clearly stating that the \$45,000 mortgage was the subject of agreement.

National says that Gray did not demand the release and that, had he done so, its forbearance to sue would have ended and its several remedies be revived and since Gray was admittedly unable to pay, it could have proceeded against him and forced a sale of the Texas land. A letter dated November 13, 1934, after the Federal Bank loan was consummated and the proceeds thereof distributed, written and signed by W. H. Gray and attested and signed by William B. Gray, an attorney, states that First National holds the Texas mortgage as part security for the principal debt; and authorized and instructed First National to sell the bonds and apply the proceeds on the principal debt. We believe these three letters and their interferences, clearly disclose that while the Grays had the right originally to a release of the mortgage, they considered it advantageous not to demand a release and finally in good faith directed First National to apply the proceeds on the principal debt and so waived objections they might otherwise have made. Grays say the loan was made to liquidate the principal debt under a sales agreement by First National. In the application the purpose was said to be the refinancing of a \$47,500 debt, \$25,000 of which was a mortgage, and the balance to be used to liquidate all other debts. Debts to First National were listed as the mortgage and \$20,000, later classified as "notes payable to banks." The application indicates that Gray may have hoped or planned, or understood that the \$25,000 was to be liquidated with \$2,500. The application, however, is not binding on First National, since it is not a party, and we cannot find it knew of the contract and later events altered the terms of the application. In a "Consent and Assignment" executed April 4, 1934, as a prerequisite to the loan, First National stated that \$45,000 was the unpaid principal debt and agreed to accept \$42,500 in satisfaction. The mortgage was never reduced to a debt of First National, although it acknowledged receipt of bonds as legal owner but only after being authorized to do so by the loaning agency. The agreement was sent to the Federal Bank in a letter clearly stating that the \$2,000 mortgage was the subject of



May 11, 1934, the Federal Bank wrote the Association that because of certain necessary deductions from the loan, the balance would be insufficient to pay the amount agreed to in the scale-down instrument, but indicated that the balance could be subordinated or paid by the applicant. May 31, 1934, the Association advised the Federal Bank that Gray had written that First National would release its lien upon acceptance of the available proceeds of the loan, since other arrangements had been made to take care of the balance. The balance referred to is obviously the balance of the amount First National agreed to accept in the Consent and Agreement.

September 14, 1934, the Association wrote First National sending/ an order for bonds in the amount of \$41,553.63, and a check for \$86.24 and also loan settlement sheets, requesting First National to obtain signatures of the Grays to the order and the settlement sheets; and stating that when the Grays had signed and paid certain expenses of the loan, the loan would be closed and the bonds remitted to First National. September 25, First National wrote the Federal Bank that it held the mortgage as a pledge and related the circumstances of its failure to make the \$10,000 loan to Gray; explained the \$65,000 principal debt; and asked authority to strike out the term "legal owner and holder" and substitute the term "pledgee" in the bond order which it was to sign. October 4, 1934, the Federal Bank answered stating the purpose of the loan was to redeem the \$45,000 mortgage and that since First National executed the "Consent and Agreement", the bank assumed First National was owner, but asked information as to who was owner. October 17, 1934, First National wrote the Federal Bank that Grays agreed that the mortgage should be additional collateral for the principal debt and stated its purpose to apply the proceeds of any bonds on that debt.



May 11, 1934, the Federal Bank wrote the Association that because of certain necessary deductions from the loan, the balance would be insufficient to pay the amount agreed to in the scale-down instrument, but indicated that the balance could be authorized or paid by the applicant. May 31, 1934, the Association advised the Federal Bank that Gray had written that First National would release the lien upon acceptance of the available proceeds of the loan, since other arrangements had been made to take care of the balance. The balance referred to is obviously the balance of the amount First National agreed to accept in the Consent and Agreement.

September 14, 1934, the Association wrote First National sending an order for bonds in the amount of \$1,532.83, and a check for \$6,24 and also loan settlement sheets, requesting First National to obtain signatures of the Grays to the order and the settlement sheets; and stating that when the Grays had signed and paid certain expenses of the loan, the loan would be closed and the bonds remitted to First National. September 25, First National wrote the Federal Bank that it held the mortgage as a pledge and related the circumstances of its failure to make the \$10,000 loan to Gray; explained the \$6,000 principal debt; and asked authority to strike out the term "legal owner and holder" and substitute the term "pledgee" in the bond order which it was to sign. October 4, 1934, the Federal Bank answered stating the purpose of the loan was to redeem the \$6,000 mortgage and that since First National executed the "Consent and Agreement", the bank assumed First National was owner, but asked information as to who was owner. October 17, 1934, First National wrote the Federal Bank that Grays agreed that the mortgage should be additional collateral for the principal debt and stated its purpose to apply the proceeds of any bonds on that debt.

October 25, 1934, the Federal Bank responded that since Grays and First National only were concerned in the ownership of the mortgage, the bond order could be executed as it was. October 31, 1934, First National returned the mortgage, settlement sheets, bond order and Gray's check for \$375 and a release of the lien of the mortgage.

A reading of these exhibits leaves no doubt that the Federal Bank entered into the transaction with full knowledge of all the circumstances surrounding the principal debt, the mortgage, the "Consent and Agreement" and the intention of First National; and those exhibits and the Grays' letter of November 13, 1934 show that the Grays fully understood all of the circumstances and were in complete accord with the purpose of the loan and the intention of First National.

We need consider no cases relating to secret agreements between applicants for such a loan and creditors since there was no such agreement shown here; nor the question of the validity of the loan, since the record shows full knowledge on the part of the Federal Bank. The Federal Bank suggested that the Grays work out suitable arrangements with First National for payment of the deficiency in the available proceeds and the amount First National agreed to accept in exchange for the mortgage and, since it clearly understood that redemption of that mortgage was the purpose of the loan, and knew of the principal debt and First National's plans, it inferentially approved whatever steps were necessary to satisfy the balance of the principal debt. There is no question here of accord and satisfaction because First National never agreed to accept the bonds in satisfaction of the principal debt.

Plaintiffs contend that because they have been in continuous possession of Woodford Farm, paying taxes for 7 successive



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 the mortgage, the bond order could be executed as it was. October 31,  
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 mortgage.

A reading of these exhibits leaves no doubt that the  
 Federal Bank entered into the transaction with full knowledge of all  
 the circumstances surrounding the principal debt, the mortgage, the  
 "Consent and Agreement" and the intention of First National; and  
 those exhibits and the Gray's' letter of November 15, 1934 show that  
 the Gray's fully understood all of the circumstances and were in  
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We need consider no cases relating to secret agreements  
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 of the principal debt. There is no question here of accord and  
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 bonds in satisfaction of the principal debt.

Plaintiff's contend that because they have been in con-  
 tinuous possession of Woodford Farm, paying taxes for 7 successive



years, that their title is absolute and not subject to the sale ordered to satisfy the claim under the decree. They seek to have section 6, Chapter 83 applied to sustain their contention. Suffice to say, the section has no bearing on this case.

It is next contended that the decree enters personal judgments jointly and severally against Mrs. Gray's heirs and that such a judgment is erroneous under the statutes of Frauds and Perjuries; and that the decretal orders are contradictory. Joint and several judgments under the statute were proper because the liability is joint and several. Whittemore v. Weber, 217 Ill. App. 628, and Mackin v. Haven, 187 Ill. 480. The respective orders regarding the sale of the realty and the liability of the devisees are not contradictory. The decree itself provides that First National shall have but one satisfaction of its debt. The same may be said of the objection that the liability of each devisee should have been limited to the amount of each one's devise. The principal contention with respect to the finding and order of the liability of the devisees seems to be that under section 13 of Chapter 58 on Frauds and Perjuries, there can be no personal judgments against the devisees, unless in the pleadings they have denied taking any land by descent. The law in Illinois is uniform with respect to this point. Since the Grays admit the devise of Woodford Farm, and since there is no question of having alienated the same before the commencement of the suit, their liability is limited to the devise. Ryan v. Jones, 15 Ill. 1; Branger, et al v. Lucy, 82 Ill. 91; The People v. Brooks, 123 Ill. 246; First National Bank v. Clark, 275 Ill. App. 282; Monroe v. Becker, 283 Ill. 42; Durflinger v. Arnold, 329 Ill. 93. The term "personal judgment" in some of these cases may be confusing. It is not used in the sense of a judgment in personam, but the cases mean that the devisees shall not be bound personally to pay the judgment against them, but that their liability is confined to their interest in the devise. It is true that judgments

years, that their title is absolute and not subject to the sale  
ordered to satisfy the claim under the decree. They seek to have  
section 8, Chapter 85 applied to sustain their contention. It is

to say, the section has no bearing on this case.

It is next contended that the decree entitles personal judgment

jointly and severally against Mrs. Gray's heirs and that such a  
judgment is erroneous under the statutes of trusts and mortgages;  
and that the decretal orders are contradictory. Joint and several

judgments under the statute were proper because the liability is  
joint and several. Whittemore v. Webb, 217 Ill. 400, 628, and Wells

v. Haven, 187 Ill. 400. The respective orders regarding the sale  
of the realty and the liability of the devisees are not contradictory.

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of Woodford farm, and since there is no question of having alienated

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limited to the devise. Egan v. Jones, 18 Ill. 41; Brannan et al v. Lusk,  
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personally to pay the judgment against them, but that their liability  
is confined to their interest in the devise. It is true that judgments

are ordered against them in the decree, but the finding in the decree determines their liability "to the extent of two-thirds of the value of Woodford Farm". Under these circumstances, we believe that the decree is not vulnerable to the objection.

For the reasons given the decree is affirmed.

DECREE AFFIRMED.

BURKE, J. CONCURS.

HEBEL, P.J. TOOK NO PART.



are ordered against them in the decree, but the finding in the decree determines their liability "to the extent of two-thirds of the value of Woodford Farm". Under these circumstances, we believe that the decree is not vulnerable to the objection.

For the reasons given the decree is affirmed.

DECREE AFFIRMED.

BURKE, J. CONCURS.

KEENE, P. J. TOOK NO PART.

320 I.A. 633

IN THE MATTER OF THE ESTATE OF  
FREDERICK E. FOSTER, Deceased,

RICHARD O. OLSON, Administrator d.b.n.  
with will annexed,

Petitioner - Appellees,

v.

MURRAY A. H. TURNER,

Respondent - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding to discover assets in which the Probate Court of Cook County and the Circuit Court on appeal entered orders adverse to Turner who has appealed.

Frederick E. Foster died about 7:30 A. M. May 20, 1937.

The assets sought are alleged to belong to his estate and consist of a considerable number of securities which Turner, Foster's nephew, admits having sold after Foster's death. Neither the securities nor the proceeds of the sales were inventoried by Charlotte Foster, widow and executrix. The estate was closed and, subsequently, reopened on behalf of a claimant against the estate in a sum in excess of \$40,000 and Olson, attorney for claimant, appointed administrator and on his petition the citation issued. The Probate Court found that the securities in question were valued at \$9,213.30, and were Foster's property at the time of his death; that Turner had not sustained his claim that Foster had made a gift of the securities to him and ordered him to deliver the securities to petitioner. The Circuit Court found that Mrs. Foster had none of the securities before filing her inventory; had received benefit of some of the proceeds of the sales by Turner; that Foster had not made a gift of the securities to Turner,

IN THE MATTER OF THE ESTATE OF  
FREDERICK M. FOSTER, deceased,

RICHARD O. OLSON, Administrator D.B.N.  
with will annexed,

Petitioner - Appellee,

v.

MURRAY A. M. TURNER,

Respondent - Appellant.

MR. JUSTICE KILBY DELIVERED THE OPINION OF THE COURT.

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Probate Court of Cook County and the Circuit Court on appeal entered

orders adverse to Turner who has appealed.

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The assets sought are alleged to belong to his estate and consist of

a considerable number of securities which Turner, Foster's nephew,

admits having sold after Foster's death. Whether the securities nor

the proceeds of the sales were inventoried by Charlotte Foster,

widow and executrix. The estate was closed and, subsequently, reopened

on behalf of a claimant against the estate in a sum in excess of

\$40,000 and Olson, attorney for claimant, appointed administrator and

on his petition the citation issued. The Probate Court found that

the securities in question were valued at \$2,213.30, and were Foster's

property at the time of his death; that Turner had not sustained his

claim that Foster had made a gift of the securities to him and ordered

him to deliver the securities to petitioner. The Circuit Court

found that Mrs. Foster had none of the securities before filing her

inventory; had received benefit of some of the proceeds of the sales

by Turner; that Foster had not made a gift of the securities to Turner;

CIRCUIT COURT

COOK COUNTY.



but that they were Foster's at his death; and ordered Turner to deliver the same or their value to petitioner.

Turner contends the securities were in his possession as a gift when Foster died; that four days thereafter he gave them to Mrs. Foster who, thereafter, re-delivered them to him to be sold and the proceeds applied to Foster household obligations.

Turner first contends that motions for findings in his favor at the close of petitioner's case and at the close of the evidence, should have been sustained because there was no proof to sustain the petition. Testimony in petitioner's behalf tends to prove that the securities were in Turner's possession when Foster died; that on the same day Turner forged Foster's name to a release of the securities; and that four days thereafter a statement was made by Turner in a document that the securities were the property of Foster. These references are sufficient to defeat the contentions. He says that having possession of the securities endorsed in blank, he is prima facie the rightful owner and that petitioner has failed to overcome that fact. The record shows that he had lived in his uncle's home since 1912; was his agent with access to Foster's safety deposit box, office vault, home safe, securities accounts; and was an officer of the Foster Company and handled Foster's personal business. Turner, possessed of securities endorsed in blank at Foster's death, was a fiduciary having the burden of proving the gift under which he claimed possession and petitioner had no burden of proving Turner was not the rightful owner. Hogg v. Eckhardt, 343 Ill. 246. It is Turner's position that he owned these stocks at the time of Foster's death, having received them as a gift in late 1936 or early 1937. In a brokerage account with Rogers & Tracy, active in Foster's name from 1925 to April 1938, all checks issued to Foster, and May 5, 1937 and April 11, 1938, the securities involved were withdrawn from the account and receipts given, signed by Turner as agent for Foster. At about one

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o'clock the day Foster died, Turner brought two stock certificates to the brokerage office of Paul Davis & Company, seeking to deposit them in the account of D. Irving Dunn & Company. Davis & Company refused to accept the certificates without a release by Foster in whose name they were issued. Turner signed Foster's name to a release, presented it and the securities were accepted, the stocks sold and the proceeds of \$2,554.30 given D. Irving Dunn in checks later endorsed by Dunn and "for deposit F. E. Foster & Co." August 18, 1937, Dunn at Turner's request sent the certificates involved to the First National Bank of Chicago, requesting transfer thereof from Foster's name to Turner's and the transfers were made. May 24, 1937, Turner and Mrs. Foster prepared a document wherein the securities are described as the property of Foster, held by Turner. Despite the account at Rogers & Tracy, the May 20, 1937, and August 18, 1937 transactions were handled elsewhere. Some of the securities were sold later through Rogers & Tracy, but not until after they had been withdrawn from Foster's account, some before, but most after, Foster's death, in his name by Turner as agent. Foster's will made April 29, 1937, gave all of his assets to his wife. Their home had been placed in her name ten years before. It is hard to believe that since the estate, excluding the securities, amounted to but \$790 that Foster would have made the hollow gesture of leaving his estate to his wife, having already given the bulk of it to Turner. Turner's gift contention is based on the presumption claimed in his favor by reason of possessing the securities endorsed in blank, and the "uncontradicted" testimony of Dunn that Foster shortly before his death stated in Dunn's presence that the securities had been given to Turner for services rendered and losses sustained in Foster's business. Having the burden of proving the gift, Turner was required to prove that the securities were delivered to him with the intention of passing the title. People v. Polhemus, 367 Ill. 185; Bolton v. Bolton, 306 Ill. 473. We have discussed the presumption he claims,



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and the record shows Dunn was present at Foster's home May 20, 1937 and took part in the transactions then and thereafter which facilitated Turner's disposition of the securities. In view of the evidence related, Dunn's testimony is not impressive. The evidence clearly shows that Foster did not make or intend to make a gift of the securities to Turner, and that Turner's conduct was not that of a donee or owner.

The evidence further shows that Mrs. Foster knew of the securities when the inventory was filed, for she admits helping prepare the May 24th document; there is evidence that Turner paid some of the proceeds for Foster's family obligations; and the court's findings with respect to her knowledge and benefits are, accordingly, supported by the record. We need not consider Turner's claim that he made a gift of the securities to Mrs. Foster since that claim must fall with his claim of a gift. He says that whether he was a donee or not, he turned the securities over to Mrs. Foster and that she, having parted with possession, is liable, and not him, for their loss and that, turning them over to her, if he was not owner, was fulfillment of his only duty. Mrs. Foster denies having received them, although the May 24th document bears the notation, "Rec. from M.A.H. Turner - Charlotte B. Foster", and although the list includes insurance policies under which she collected benefits. She claims "Rec." means record, not receipt. We deem it unnecessary to decide whether she did or did not receive them. Turner failed to establish the gift to him and the case against him was, thereby, established. The May 24th document might suggest that he turned the securities over to Mrs. Foster, as executrix, as assets of the estate. A later document listing the securities bearing a notation purporting to be made by Turner September 7th, that the securities belonged to Mrs. Foster,



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he made a gift of the securities to Mrs. Foster since that claim was in fact with his claim of a gift. He says that whether it was a donee

or not, he turned the securities over to Mrs. Foster and that she, having parted with possession, is liable, and not him, for their loss and that, turning them over to her, if he was not owner, was fulfillment of his only duty. Mrs. Foster denies having received them.

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Turner - Charlotte B. Foster", and although the list includes insurance policies under which she collected benefits. The claims "Recd." means record, not receipt. We deem it unnecessary to decide

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document listing the securities bearing a notation purporting to be

made by Turner September 7th, that the securities belonged to Mrs. Foster,



and his sales and disposition of the proceeds in the manner used contradict any such claim. He cannot escape liability for his actions by imputing guilt, justifiably or not, to Mrs. Foster.

We have considered all unstricken evidence in the record, and need not discuss the dispute over admissibility of some of the evidence.

Turner finally contends that the order appealed from is unenforceable since it does not find that he has in his possession or control, or conceals or has converted the securities involved; and further, because the order does not determine the value of the stocks and, therefore, is uncertain as to the alternative directive. The order finds that Turner had the securities which belonged to the estate; that the securities were not a gift from Foster, but were the latter's property when he died. In our opinion these findings were sufficient basis for the order. We are further of the opinion that the order is sufficiently certain to enable respondent to determine the value of the stock as ordered in the event that it is necessary for him to comply with the alternative. The order is, therefore, affirmed.

ORDER AFFIRMED.

BURKE, J. CONCURS.

HEBEL, P.J. TOOK NO PART.

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 that the order is sufficiently certain to enable respondent to  
 determine the value of the stock as ordered in the event that it  
 is necessary for him to comply with the alternative. The order is,  
 therefore, affirmed.

ORDER AFFIRMED.

BUCKE, J. CONCURS.

KEHEL, P. J. TOOK NO PART.

42287

320 I.A. 684<sup>1</sup>

WOODLAWN UNION BAPTIST CHURCH, an  
Unincorporated Religious Organization,  
WILLIAM MOON, WILLIAM H. PYBURN, JOHN  
COLLINS, JOHN TUCKER and C. J. WHITFIELD,  
Deacons and JAMES C. COBBINS, J. D.  
BROOKS, FLETCHER BERRY, HARROLD H. FARRELL,  
and JAMES H. HARRISON, Trustees,

Appellees,

v.

HAMILTON D. MARTIN, T. P. POLK, PINKNEY  
HALL, LOUIS BAXTER, W. H. WEBB, LOGAN  
WATSON, E. S. LEWIS, LEVI SIMS, HAROLD  
CLAY, and JAMES H. OLDHAM,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying defendants' motion to vacate an order dismissing an injunction proceeding, wherein defendants were restrained from doing certain acts in connection with the affairs of plaintiff-church. The suit was begun January 5, 1940, on which day Attorney Joseph Clayton filed a written appearance for defendants. February 26, 1941, an answer was filed by Attorneys Williams and Clayton. June 24, 1941, the cause was referred to a master. October 24, 1941, Williams filed Martin's verified petition, alleging that under cover of the temporary injunction, while defendants were unsuccessfully trying to have the hearing on merits determined, plaintiffs were carrying on a course of conduct designed to destroy the efficacy of the church; and praying for an order restraining plaintiffs from molesting Martin, as pastor, in his conduct of church affairs. January 22, 1942, plaintiffs' counsel made a motion to dismiss and, "defendants objecting", a hearing was ordered for February 5, 1942, and defendants given 5 days to file suggestions. The record shows Attorneys Williams and Westbrook appeared for defendants and that Williams objected to dismissal because there had been a partial hearing and there were damages. January 28th, Williams filed Suggestions of Damages in the nature of attorneys' fees.



3201.A.684

WOLLA UNION BAPTIST CHURCH, an  
Incorporated Religious Organization,  
WILLIAM MOON, WILLIAM H. BYRNE, JOHN  
COLLINS, JOHN TUCKER and C. J. WHITEFIELD,  
Deacons and JAMES G. COLLINS, J. B.  
BROOKS, FLETCHER BERRY, HAROLD H. FAREWELL,  
and JAMES H. HARRISON, Trustees,

Appellants,

v.

HAMILTON D. MARTIN, T. B. POLK, PINKNEY  
HALL, LOUIS BAXTER, W. H. LEE, LOGAN  
WATSON, E. LEWIS, LEVI SIMS, HAROLD  
CLAY, and JAMES H. CLAYMAN,

Appellees.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying defendants' motion

to vacate an order dismissing an injunction proceeding, wherein

defendants were restrained from doing certain acts in connection

with the affairs of plaintiff-church. The suit was begun January 5,

1940, on which day Attorney Joseph Clayton filed a written appearance

for defendants. February 28, 1941, an answer was filed by Attorneys

Williams and Clayton. June 24, 1941, the cause was referred to a

master. October 24, 1941, Williams filed Martin's verified petition,

alleging that under cover of the temporary injunction, while

defendants were unsuccessfully trying to have the hearing on merits

determined, plaintiffs were carrying on a course of conduct designed

to destroy the efficacy of the church; and praying for an order

restraining plaintiffs from molesting Martin, as pastor, in his

conduct of church affairs. January 22, 1942, plaintiffs' counsel

made a motion to dismiss and, "defendants objecting," a hearing was

ordered for February 5, 1942, and defendants given 3 days to file

suggestions. The record shows Attorneys Williams and Westbrook

appeared for defendants and that Williams objected to dismissal.

Because there had been a partial hearing and there were damages.

January 28th, Williams filed suggestions of damages in the nature

of attorneys' fees.

SUPERIOR COURT

OSOR COUNTY.

FILED FROM

February 5th, when the matter came on for hearing, the court clerk informed the court that Attorney Williams had appeared earlier, informing the clerk that he had withdrawn his objections. Attorney Westbrook then told the court he represented some of the defendants and objected to the dismissal. Upon objection of plaintiffs' counsel that Westbrook was not attorney of record and because Williams had withdrawn his objections, the court declined to permit Westbrook to argue the matter or to file an appearance and entered the order of dismissal.

February 17, 1942, Ellis & Westbrook filed an appearance and motion to vacate the order of dismissal on the ground that it had violated Section 52 of the Practice Act, since there had been a partial hearing before the master and neither stipulation to dismiss nor special motion supported by affidavit. This motion was denied February 19, 1942 by an order reciting that the parties were represented by their respective "attorneys of record".

Defendants here rely upon Chicago Title and Trust Company v. County of Cook, 279 Ill. App. 462 and Cunderson v. First National Bank of Chicago, 296 Ill. App. 111, to sustain their position that the order violated section 52. In those cases the dismissal orders were entered over objections of defendants, while in the instant case, although the order setting the dismissal motion for a hearing recited that defendants objected, there is no denial that Attorney Williams, before hearing, withdrew the objections. Since withdrawal of objections was equivalent to a stipulation, the dismissal order was proper unless there was error in refusing to permit Attorney Westbrook to appear and object February 5th.

Defendants here say that Attorney Clayton, not Williams, was of record; however, they do admit that Williams was Clayton's associate and the record shows pleadings, motions and appearances by



February 5th, when the matter came on for hearing, the court clerk informed the court that Attorney Williams had appeared earlier, informing the clerk that he had withdrawn his objections. Attorney Westbrook then told the court he represented some of the defendants and objected to the dismissal. Upon objection of Williams' counsel that Westbrook was not attorney of record and because Williams had withdrawn his objections, the court declined to permit Westbrook to argue the matter or to file an appearance and entered the order of dismissal.

February 17, 1942, Ellis & Westbrook filed an appearance and motion to vacate the order of dismissal on the ground that it had violated Section 52 of the Practice Act, since there had been a partial hearing before the master and neither stipulation to dismiss nor special motion supported by affidavit. This motion was denied February 18, 1942 by an order reciting that the parties were represented by their respective "attorneys of record".

Defendants here rely upon Chicago Title and Trust Company v. County of Cook, 298 Ill. App. 482 and Gunderson v. First National Bank of Chicago, 298 Ill. App. 111, to sustain their position that the order violated section 52. In those cases the dismissal orders were entered over objections of defendants, while in the instant case, although the order setting the dismissal motion for a hearing recited that defendants objected, there is no denial that Attorney Williams, before hearing, withdrew the objections. Since withdrawal of objections was equivalent to a stipulation, the dismissal order was proper unless there was error in refusing to permit Attorney Westbrook to appear and object February 5th.

Defendants here say that Attorney Clayton, not Williams, was of record; however, they do admit that Williams was Clayton's associate and the record shows affidavits, motions and stipulations by



Williams for more than a year, with no objection from any source. Attorney Westbrook made no attempt to be substituted as counsel in the usual mode by notice, withdrawal and consent, and nothing in the record shows participation by him in the dispute of January 22nd. He said he represented some of the defendants and plaintiffs point out that defendants appear to have divided into factions. There was ample opportunity between January 22nd and February 5th, for attorneys and defendants to adjust their positions or seek aid of, or advise or consult with the court in the matter. We believe the court acted properly. After denying Attorney Westbrook leave to appear, the court seems to have approved a later unauthorized appearance filed without notice, withdrawal or consent, by considering the motion to vacate.

Defendants claim that plaintiffs by failing to answer defendants' motion, admitted well-pleaded allegations justifying the order to vacate. The motion was based on the alleged violation of section 52 and presented a question of law on the circumstances here. We believe that, when entered, the dismissal order was in compliance with section 52 and that the trial court did not commit error by entering the same nor in denying the motion to vacate. No other points raised are essential to this decision. The order appealed from is therefore affirmed.

ORDER AFFIRMED.

BURKE, J. CONCURS.

HEBEL, P.J. TOOK NO PART.

Williams for more than a year, with no objection from any source. Attorney Westbrook made no attempt to be substituted as counsel in the usual mode by notice, withdrawal and consent, and nothing in the record shows participation by him in the district of January 22nd. He said he represented some of the defendants and plaintiffs point out that defendants appear to have divided into factions. There was ample opportunity between January 22nd and February 21st for attorneys and defendants to adjust their positions or seek aid of, or advice or consent with the court in the matter. We believe the court acted properly. After denying Attorney Westbrook leave to appear, the court seems to have approved a later unauthorized appearance filed without notice, withdrawal or consent, by considering the motion to vacate.

Defendants claim that plaintiffs by failing to answer defendants' motion, admitted well-pleaded allegations justifying the order to vacate. The motion was based on the alleged violation of section 52 and presented a question of law on the circumstances here. We believe that, when entered, the dismissal order was in compliance with section 52 and that the trial court did not commit error by entering the same nor in denying the motion to vacate. No other points raised are essential to this decision. The order appealed from is therefore affirmed.

ORDER AFFIRMED.

HUBB, J. J. TOOK NO PART.  
BURNETT, J. CONCURS.

42405

WILLIAM LANGFORD,

Appellant,

v.

PAUL F. SMITH,

Appellee.

320 I.A. 684<sup>2</sup>

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action in which judgment was directed for defendant. Plaintiff charged defendant in the first count with negligence, and in the second with wilful and wanton misconduct, in operating his automobile which struck and injured plaintiff near the safety island at the southeast corner of Ashland avenue and 64th street in Chicago, Illinois.

The question is whether, assuming plaintiff's evidence to be true and favoring him strongly in drawing legal inferences, there is any evidence which tends to prove he was injured, while in the exercise of due care, by the negligence of defendant under Count 1; or whether he was injured without regard to his own conduct, through defendant's wilful and wanton misconduct, under Count 2.

Testimony favorable to plaintiff, 63 years old at the time, is that he saw defendant's automobile one block south when he was at the curb awaiting an approaching northbound street car; that as he walked toward the safety island, he was looking south toward the south end of the street car; that visibility was clear from the south toward him and from him toward the south; that he was in a "bunch" preparing to board the street car; and that defendant's automobile "busted through" going 40 miles an hour. The court said there was no evidence, with legal inferences considered most strongly in plaintiff's favor, which tended to show plaintiff's due care, defendant's



330 I.A. 684

A PLEA FROM

WILLIAM LANGFORD,

Appellant,

v.

PAUL F. SMITH,

Appellee.

COOK COUNTY.

SUPERIOR COURT

MR. JUSTICE KELLY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action in which judgment was directed for defendant. Plaintiff charged defendant in the first count with negligence, and in the second with willful and wanton misconduct, in operating his automobile which struck and injured plaintiff near the safety island at the southeast corner of Ashland avenue and 54th street in Chicago, Illinois.

The question is whether, assuming plaintiff's evidence to be true and favoring him strongly in drawing legal inferences, there is any evidence which tends to prove he was injured, while in the exercise of due care, by the negligence of defendant under count 1; or whether he was injured without regard to his own conduct, through defendant's willful and wanton misconduct, under Count 2. Testimony favorable to plaintiff, 33 years old at the time,

is that he saw defendant's automobile one block south when he was at the curb awaiting an approaching northbound street car; that as he walked toward the safety island, he was looking south toward the south end of the street car; that visibility was clear from the south toward him and from him toward the south; that he was in a "bunch" preparing to board the street car; and that defendant's automobile "passed through" going 40 miles an hour. The court said there was no evidence, with legal inferences considered most strongly in plaintiff's favor, which tended to show plaintiff's due care, defendant's

negligence, nor defendant's excessive speed. Defendant argues that, since plaintiff saw the approaching automobile a block away and did not look for or see it again before or during his crossing toward the safety island, he was guilty of contributory negligence as a matter of law. Visibility was clear from plaintiff's and defendant's view.

The favorable inference from plaintiff's testimony that he did not see or look to see defendant's automobile again, is that he would have seen it had it been within range of his view, since as he walked across to the safety island he was looking south toward the south end of the street car, but that the automobile approaching at an unreasonable speed, was not in plaintiff's range of vision before he gave his attention to boarding the safety island near which he was struck. We cannot hold that reasonable men under the circumstances here would come to but one conclusion, that plaintiff was not exercising due care. Evidence that defendant, drove at 40 miles per hour, "busting" through a "bunch" on the way to board a street car at 5:30 P. M. on a clear day with a clear view ahead, with legal inferences most strongly in plaintiff's favor, tends to prove the second count. We hold, accordingly, both counts should have been submitted to the jury. Bryan v. City of Chicago, 371 Ill. 64, cited by defendant, is not helpful to this decision.

For the reasons herein given the judgment of the Superior Court is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND CAUSE REMANDED.

BURKE, J. CONCURS.

HEBEL, P.J. TOOK NO PART.

negligence, nor defendant's excessive speed. Defendant argues that since plaintiff saw the approaching automobile a block away and did not look for or see it again before or during his crossing toward the safety island, he was guilty of contributory negligence as a matter of law. Viability was clear from plaintiff's and defendant's

view. The favorable inference from plaintiff's testimony that he did not see or look to see defendant's automobile again, is that he would have seen it had it been within range of his view, since as he walked across to the safety island he was looking south toward the south end of the street car, but that the automobile approaching at an unreasonable speed, was not in plaintiff's range of vision before he gave his attention to boarding the safety island near which he was struck. We cannot hold that reasonable men under the circumstances here would come to but one conclusion, that plaintiff was not exercising due care. Evidence that defendant drove at 40 miles per hour, "busting" through a "bunch" on the way to board a street car at 5:30 P. M. on a clear day with a clear view ahead, with legal inferences most strongly in plaintiff's favor, tends to prove the second count. We hold, accordingly, both counts should have been submitted to the jury. Gray v. City of Colorado, 271 Ill. 64, cited by defendant, is not helpful to this decision.

For the reasons herein given the judgment of the Superior Court is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

JUDGMENT REVERSED AND AUSTIN REINSTATED.

BURKE, J. CONCUR.  
HABEL, P. J. TOOK NO PART.



42683

320 I.A. 685

CITY OF CHICAGO,  
Appellee,

v.

WHOLESALE COAL DISTRIBUTORS COMPANY,  
and WILLIAM H. RUBIN.  
Appellants.

APPEAL FROM

MUNICIPAL COURT,  
OF CHICAGO.

256  
169

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The City filed a quasi-criminal complaint in the Municipal court of Chicago against defendants charging that on June 16, 1942, defendants violated Sections 8 and 9, of chapter 172, of the Municipal Code of Chicago. The charge, which was said to be a violation of Section 8, was that defendants on June 16, 1942, sold and delivered to Jerry Genese, two or more different kinds and sizes of coal which had been mixed in such a manner as to prevent the purchaser or the City Inspector of Weights and Measures from re-weighing them separately. And as to Section 9 it was charged that defendants sold and delivered the coal as Pocahontas coal which contained more than 26 per cent volatile matter.

On the same day an order was entered in which it is recited that the complaint under oath was presented to the court and having been examined, the court granted leave to file it; that defendants being duly advised by the court as to the right of a trial by jury, elected to waive jury trial and by agreement, the matter was submitted to the court for trial without a jury; that thereupon the court heard the evidence and argument of counsel finding defendants guilty of violation of the ordinance as charged and a fine of \$25 was imposed. Defendants moved to vacate the judgment and the matter was continued to the next day when an order was entered overruling the motion. An appeal was prayed and

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1935

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF FLORIDA

VS.

THE STATE OF FLORIDA, PLAINTIFF,  
VERSUS  
JAMES EARL RAY, DEFENDANT.

JOHN W. ...

...

...

...

The City filed a complaint against the defendant in the Circuit Court of Chicago against defendant charging that on or about May 1, 1968, defendant violated Sections 3 and 4 of Chapter 111, of the Municipal Code of Chicago. The charge, which was made to be a violation of Section 3, was that defendant on May 1, 1968, sold and delivered to Jerry Jones, two or more different kinds and sizes of coal which had been mined in such a manner as to prevent the purchase of the City Inspector of Police and to cause from the sale and delivery thereof. And as to Section 4 it was charged that defendant sold and delivered the coal as mentioned coal which contained more than 50 per cent volatile matter.

On the same day an order was entered in which it is recited that the complaint under oath was presented to the court and having been examined, the court granted leave to file it; that defendant had duly advised by the court as to the right of a trial by jury, elected to have jury trial and by agreement, the matter was submitted to the court for trial without jury; that thereupon the court heard the evidence and argument of counsel finding defendant guilty of violation of the ordinance as charged and a fine of \$50 was imposed. Defendant moved to vacate the judgment and the matter was continued to the next day when an order was entered overruling the motion. An appeal was prayed for

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allowed.

September 4, defendants filed a written motion alleging a number of matters and prayed that an order be entered vacating the finding of guilty and judgment under Sections 8 and 9, and an order was entered reciting that defendants moved to vacate the finding and judgment and for a new trial. The matter was set for hearing on September 18. Afterwards other orders were entered continuing the matter until October 7 when an order was entered vacating the finding of guilty and judgment as to Section 8, and overruling the motion to vacate the finding and judgment as to Section 9. January 4, 1943, defendant, the Wholesale Coal Distributors, filed its notice of appeal from the judgment of August 4, 1942 finding it guilty and from the order entered October 7, 1942, denying its motion to vacate the judgment and for a new trial.

The report of proceedings of the trial was filed March 23, 1943.

So far as we are able to find from the record, no notice of appeal was filed by defendant, William H. Rubin, but the brief purports to be filed on behalf of the two defendants. The evidence is to the effect that June 16, 1942, the defendants, Wholesale Coal Distributors, delivered 9 tons of coal described as Pocahontas, to Senese. That plaintiff took a sample of the coal and had it analyzed and the analysis showed that "the volatile matter was 26.82" per cent in violation of Section 9 of Chapter 172, of the Municipal Code of Chicago, which provides that such percentage must not be more than 26 per cent. An analysis of the coal was made by the Commercial Testing & Engineering Co., June 16, 1942. On the trial defendants offered to show that on July 20, 1942, the same engineering company made another analysis of a sample of the same coal which showed the volatile content of the coal to be 25.98 per cent.

C. W. Morton, who was employed by the Commercial Testing &



allowed.

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1943.

So far as we are able to find from the record, no notice of appeal was filed by defendant, William H. Rubin, but the brief purports to be filed on behalf of the two defendants. The evidence is to the effect that June 16, 1942, the defendants, Wholesale Coal Distributors, delivered 9 tons of coal described as Pocahontas, to Geneva. That plaintiff took a sample of the coal and had it analyzed and the analysis showed that "the volatile matter was 26.82" per cent in violation of Section 9 of Chapter 175, of the Municipal Code of Chicago, which provides that such percentage must not be more than 26 per cent. An analysis of the coal was made by the Commercial Testing & Engineering Co., June 16, 1942. On the trial defendants offered to show that on July 20, 1942, the same engineering company made another analysis of a sample of the same coal which showed the volatile content of the coal to be 25.99 per cent. C. W. Norton, who was employed by the Commercial Testing &

3.

Engineering Company, called by the City, testified as to the analysis made of the coal by the engineering company. There was further testimony to the effect that immediately after the coal was delivered a representative of the City took 15 or 16 shovels full from different parts of the coal where it was delivered which was used in making the analysis. The same witness Mr. Merton was afterward called by defendants and testified as to the second analysis made by his company on July 20, but upon objection of counsel for the City, the written report of the analysis was excluded. Defendants offered no evidence as to who took the samples of coal from the bin where it was delivered from which the second analysis was made.

Counsel for defendants in his brief, in referring to the pleadings and the statement of the case says: "The defendants contend that the court lacked jurisdiction as the complaint was never filed, and shows that no filing stamp was ever placed thereon." But no such point is made in the brief of counsel when he comes to the "Points and Authorities." The points made are: (1) that the verdict is against the manifest weight of the evidence; (2) that an action to recover a penalty for the violation of a city ordinance is quasi-criminal in its nature and requires a greater degree of proof than a mere preponderance of evidence; (3) that where a jury has been waived, evidence may be offered to prove the ordinance unreasonable; (4) that the court erred in refusing to admit the analysis made by the engineering company for defendants, and (5) that the trial court "requested guidance by the Appellate Court and that a definite rule be established for the guidance of the Municipal Court of Chicago in handling these cases."

The contention that the complaint was not filed is frivolous and wholly without merit. It is in the record prepared at the request of counsel for defendants and is abstracted in the abstract prepared by him. Moreover, on the trial no point was made that the complaint had not been filed.



Engineering Company, called by the City, testified as to the analysis made of the coal by the engineering company. There was further testimony to the effect that immediately after the coal was delivered a representative of the City took 15 or 16 shovels full from different parts of the coal where it was delivered which was used in making the analysis. The same witness Mr. Norton was afterwards called by defendants and testified as to the second analysis made by his company on July 20, but upon objection of counsel for the City, the written report of the analysis was excluded. Defendants offered no evidence as to who took the samples of coal from the bin where it was delivered from which the second analysis was made. Counsel for defendants in his brief, in referring to the pleadings and the statement of the case says: "The defendants contend that the court lacked jurisdiction as the complaint was never filed, and shows that no filing stamp was ever placed thereon." But no such point is made in the brief of counsel when he comes to the "Points and Authorities." The points made are: (1) that the verdict is against the manifest weight of the evidence; (2) that an action to recover a penalty for the violation of a city ordinance is quasi-criminal in its nature and requires a greater degree of proof than a mere preponderance of evidence; (3) that where a jury has been waived, evidence may be offered to prove the ordinance unreasonable; (4) that the court erred in refusing to admit the analysis made by the engineering company for defendants, and (5) that the trial court "requested guidance by the Appellate Court and that a definite rule be established for the guidance of the Municipal Court of Chicago in handling these cases."

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The contention that the instant case is quasi-criminal in nature, as counsel for defendants contends, must be sustained, City of Chicago v. Dickson, 221 Ill. App. 255; City of Mt. Vernon v. Rainwater, 245 Ill. App. 304; and requires a greater degree of proof to warrant a conviction than a civil action. The complaint in the instant case is designated "quasi-criminal complaint." Since we have decided that a new trial must be had we do not discuss the evidence in detail nor pass on the question as to whether the finding and judgment is against the manifest weight of the evidence. When the facts are adduced on the trial we think the trial court will have no trouble in passing on the admissibility of the two analyses claimed to have been made of the coal.

As above stated, the court after hearing the evidence found defendants guilty as charged in the complaint. Afterward, on motion of counsel for defendants, the court vacated the judgment which found defendants guilty of violating Section 8 of the ordinance. This left that part of the case undisposed of. Cases will not be reviewed piecemeal, but when the whole case is finally disposed of, only then will the matter be reviewed. Walters v. Mercantile Nat. Bank of Chicago, 380 Ill. 477. Following the holding in the Walters case, the appeal is dismissed.

APPEAL DISMISSED.

Niemeyer, J., and Matchett, J., concur.

The contention that the instant case is quasi-criminal in nature, as counsel for defendants contends, must be sustained, City of Chicago v. Dickson, 221 Ill. App. 222; City of St. Vernon v. Rainwater, 245 Ill. App. 304; and requires a greater degree of proof to warrant a conviction than a civil action. The complaint in the instant case is designated "quasi-criminal complaint." Since we have decided that a new trial must be had we do not discuss the evidence in detail nor pass on the question as to whether the finding and judgment is against the manifest weight of the evidence. When the facts are adduced on the trial we think the trial court will have no trouble in passing on the admissibility of the two analyses claimed to have been made of the coal.

As above stated, the court after hearing the evidence found defendants guilty as charged in the complaint. Afterward, on motion of counsel for defendants, the court vacated the judgment which found defendants guilty of violating Section 8 of the ordinance. This left that part of the case undisposed of. Cases will not be reviewed piecemeal, but when the whole case is finally disposed of, only then will the matter be reviewed. Walters v. Mercantile Nat. Bank of Chicago, 380 Ill. 477. Following the holding in the Walters case, the appeal is dismissed.

APPEAL DISMISSED.

Wiemeyer, J., and Matsonett, J., concur.

42693

3201A.685<sup>2</sup>

ESCANABA VENEER COMPANY, a Corporation,

Appellee,

v.

W. A. HERBERT, individually and doing business as W. A. HERBERT & Co.,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover the amount claimed to be due for the sale and delivery of about 4,000 veneer panels of plywood. The defense was that defendant had rejected the panels because they were not as ordered and could not be used for the purpose for which they were purchased. Defendant filed a counter claim to recover certain advances made by it in connection with the handling of the panels and the profit which it would have realized out of the sale of them. There was a jury trial and a verdict and judgment in plaintiff's favor for \$1,771.23. Defendant appeals.

The record discloses that plaintiff was in the business of manufacturing plywood panels at Escanaba, Michigan and about October 14, 1939, accepted an order from defendant for about 4,000 panels at 12 1/2 cents per square foot, "stock to be guaranteed against warpage - must be flat stock." Shortly thereafter defendant sold the 4,000 panels to the Grand Woodworking Company, of Chicago. The panels were for "tops to be used for game boards" in playing a game called pin ball. At the time of accepting the order both parties knew the purpose for which the panels were to be used. After the receipt of the order plaintiff manufactured the panels and about February 8, 1940, sent them by railway to defendant's customer, the



8201A.088

ESCANABA VENEER COMPANY, a Corporation,

Appellee,

v.

W. A. HERBERT, individually and  
doing business as W. A. HERBERT  
& Co.,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COON COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover the amount claimed to be due for the sale and delivery of about 4,000 veneer panels of plywood. The defense was that defendant had rejected the panels because they were not as ordered and could not be used for the purpose for which they were purchased. Defendant filed a counter claim to recover certain advances made by it in connection with the handling of the panels and the profit which it would have realized out of the sale of them. There was a jury trial and a verdict and judgment in plaintiff's favor for \$1,771.25. Defendant appeals.

The record discloses that plaintiff was in the business of manufacturing plywood panels at Escanaba, Michigan and about October 14, 1933, accepted an order from defendant for about 4,000 panels at 12 1/2 cents per square foot. "Stock to be guaranteed against waste - must be flat stock." Shortly thereafter defendant sold the 4,000 panels to the Grand Woodworking Company, of Chicago. The panels were for "tops to be used for game boards" in playing a game called pin ball. At the time of accepting the order both parties knew the purpose for which the panels were to be used. After the receipt of the order plaintiff manufactured the panels and about February 8, 1940, sent them by railway to defendant's customer, the

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Grand Woodworking Co. Upon arrival of the car, the Woodworking company began to unload the panels and claimed that they were warped, refused to accept them and plaintiff was notified of the rejection. Representatives of plaintiff came to Chicago and about 300 panels were inspected by all parties interested and but 194 of the 4,000 were accepted by the Woodworking company. Afterward the panels which were not accepted were stored by plaintiff in a warehouse in Chicago, and in July, 1940, were sold by plaintiff to the Woodworking company for 7 cents per square foot.

Plaintiff contends that the panels substantially complied with the order it received and that the rejection of them was not warranted by the facts. On the other side, defendant's position is that upon arrival of the panels in Chicago, its customer, the Woodworking company, refused to accept them because the panels were not flat but were warped and could not be used for the purpose for which they were purchased and therefore were properly rejected.

Counsel for defendant contend that the jury acted capriciously and arbitrarily; that the evidence all shows that plaintiff and defendant knew the purpose for which the panels were to be used and plaintiff warranted that they would be flat and free from warpage; that upon arrival the panels were warped and could not be used for the tops of the tables and were rejected, the rejection accepted orally and in writing by plaintiff, and therefore there was nothing to submit to the jury; that the question for decision was one of law for the court. In this contention counsel say: "A question of law should not be submitted to the jury but should be passed upon by the court. Where the facts are not complicated and are not controverted; where there is no presumption involved; where there are no improbabilities as to the surrounding facts, and where there is no room for different inferences of fact to be drawn from the undisputed facts, the question presented under a motion to direct a verdict is a question of law for the court and not a question of fact for the jury." This is a correct statement of the



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and could not be used for the purpose for which they were purchased

and therefore were properly rejected.

Counsel for defendant contend that the jury acted capriciously and

arbitrarily; that the evidence all shows that plaintiff and defendant

knew the purpose for which the panels were to be used and plaintiff

warranted that they would be flat and free from warpage; that upon

arrival the panels were warped and could not be used for the tops of

the tables and were rejected, the rejection accepted orally and in

writing by plaintiff, and therefore there was nothing to submit to the

jury; that the question for decision was one of law for the court. In

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sumption involved; where there are no improbabilities as to the sur-

rounding facts, and where there is no room for different inferences of

fact to be drawn from the undisputed facts, the question presented under

a motion to direct a verdict is a question of law for the court and not

a question of fact for the jury." This is a correct statement of the



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law and counsel continue: "The facts of the instant case hereinbefore presented are not complicated; the material facts are not controverted; there are no improbabilities as to the surrounding facts and there is no room for different inferences of fact to be drawn from the undisputed facts, \*\*\* and the Court erred in not granting defendant's motion for a directed verdict at the close of all of the evidence.

We are unable to agree that there was no controverted question of fact. We have examined all the evidence in the record and the argument of counsel and are of opinion that the question was for the jury. Plaintiff's evidence was to the effect that the panels could be used for the purpose for which they were ordered; that defendant and his customer, in examining the panels applied a too rigid test and not such a test as is usually made in such cases. Plaintiff's evidence is further to the effect that it did not accept defendant's rejection of the panels but thought it was useless to go through with the rigid test required by defendant and its customers. On the other hand, defendant's evidence is to the effect that the boards were not flat but warped; that they could not be used for the tops of tables for which they were purchased and therefore were properly rejected. And further, that the rejection by defendant's customer was accepted by plaintiff both orally and in writing. In these circumstances we think the question was for the jury and the court did not err in refusing to direct a verdict in defendant's favor at the close of all the evidence.

Defendant further contends that the judgment is excessive and refers to Ill. Rev. Stat. 1943, ch. 121 1/2, §67, par. 3, which provides "Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances \*\*\* is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered," and say that the price at which the panels were sold to defendant was 12 1/2 cents per square foot and that

law and counsel continue: "The facts of the instant case hereinbefore presented are not complicated; the material facts are not controverted; there are no improbabilities as to the surrounding facts and there is no room for different inferences of fact to be drawn from the undisputed facts, \*\*\* and the Court erred in not granting defendant's motion for a directed verdict at the close of all of the evidence.

We are unable to agree that there was no controverted question of fact. We have examined all the evidence in the record and the argument of counsel and are of opinion that the question was for the jury. Plaintiff's evidence was to the effect that the panels could be used for the purpose for which they were ordered; that defendant and his customer, in examining the panels applied a too rigid test and not such a test as is usually made in such cases. Plaintiff's evidence is further to the effect that it did not accept defendant's rejection of the panels but thought it was useless to go through with the rigid test required by defendant and its customer. On the other hand, defendant's evidence is to the effect that the boards were not flat but warped; that they could not be used for the tops of tables for which they were purchased and therefore were properly rejected. And further, that the rejection by defendant's customer was accepted by plaintiff both orally and in writing. In these circumstances we think the question was for the jury and the court did not err in refusing to direct a verdict in defendant's favor at the close of all the evidence.

Defendant further contends that the judgment is excessive and refers to Ill. Rev. Stat. 1943, ch. 121 1/2, § 87, par. 3, which provides "where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances \*\*\* is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered," and says that the price at which the panels were sold to defendant was 12 1/2 cents per square foot and that



4.

William J. Anthony, a witness for plaintiff, testified that the market price for game boards in the city of Chicago in July, 1940, was 12 1/2 cents and that Andrew Ellingsen, superintendent for the Grand Woodworking Co. testified that the market price for the panels in July was 12 1/2 cents to 14 1/2 cents, while plaintiff sold the panels in July for 7 cents per square foot. On the other side, plaintiff's evidence is to the effect that when the panels were refused it endeavored to resell them; that other manufactures of games in and about Chicago were called upon in an endeavor to sell the panels without success. H. L. Rosenthal, who acted as agent for plaintiff in the selling of panels testified that he made an attempt to resell them. "I had to sell what we term in the trade as job lot plywood. Job lot plywood is plywood that is made for a particular purpose and if it is not used for that particular purpose, it becomes a commodity that is worth very much less than standard stock on the market."

There was no error in the admission of evidence.

In view of the evidence we are of opinion that the damages awarded by the jury cannot be held to be excessive.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Matchett, J., concur.



William J. Anthony, a witness for plaintiff, testified that the market price for game boards in the city of Chicago in July, 1940, was 12 1/2 cents and that Andrew Ellingsen, superintendent for the Grand Woodworking Co., testified that the market price for the panels in July was 12 1/2 cents to 14 1/2 cents, while plaintiff sold the panels in July for 7 cents per square foot. On the other side, plaintiff's evidence is to the effect that when the panels were resold it endeavored to resell them; that other manufacturers of game boards in and about Chicago were called upon in an endeavor to sell the panels without success. H. L. Rosenthal, who acted as agent for plaintiff in the selling of panels testified that he made an attempt to resell them. "I had to sell what we term in the trade as job lot plywood. Job lot plywood is plywood that is made for a particular purpose and if it is not used for that particular purpose, it becomes a commodity that is worth very much less than standard stock on the market."

There was no error in the admission of evidence.  
In view of the evidence we are of opinion that the damages awarded by the jury cannot be held to be excessive.  
The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Niemeyer, J., and Mattheis, J., concur.

42714

320 I.A. 686

ANNA BERNING,  
Appellee,

v.

CARRIE E. BERNING, et al.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

On Appeal of

CARRIE E. BERNING,  
Appellant.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her complaint in chancery in the nature of a creditor's bill, seeking to have certain assets of defendant, Carrie E. Berning, subjected to the lien of her judgment. Afterward the complaint was amended and when the issue was made up, the cause was referred to a master in chancery to take the evidence and make up his report with his findings and recommendations. The master did as directed and recommended that a decree be entered finding that plaintiff is entitled to subject the beneficial interest of defendant, Carrie E. Berning, in the trust estate, to the lien of plaintiff's judgment. Objections which were filed to the report were overruled and a decree was entered in which it was found that the objections to the master's report were overruled but no exceptions thereto were filed. The master's report was approved and confirmed and it was decreed that unless the judgment was paid the interest of defendant, Carrie E. Berning, as beneficiary of a trust in certain real estate, which was found to be personal property, be sold. Carrie E. Berning appeals.

Counsel for Carrie E. Berning who appeals says: "The only question that arises in the cause at bar is whether the Court was justified in regarding the trust agreement executed by Carrie E. Berning as converting the real estate owned by her and conveyed at

320 I.A. 686

42714

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

ANNA BERNING,  
Appellee,  
v.  
GARLIE E. BERNING, et al.  
Appellant.

On Appeal of

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her complaint in chancery in the nature of a

creditor's bill, seeking to have certain assets of defendant,

Garlie E. Berning, subjected to the lien of her judgment. After-

ward the complaint was amended and when the issue was made up, the

cause was referred to a master in chancery to take the evidence and

make up his report with his findings and recommendations. The master did

as directed and recommended that a decree be entered finding that

plaintiff is entitled to subject the beneficial interest of defendant,

Garlie E. Berning, in the trust estate, to the lien of plaintiff's

judgment. Objections which were filed to the report were overruled

and a decree was entered in which it was found that the objections

to the master's report were overruled but no exceptions thereto were

filed. The master's report was approved and confirmed and it was

decree that unless the judgment was paid the interest of defendant,

Garlie E. Berning, as beneficiary of a trust in certain real estate,

which was found to be personal property, be sold. Garlie E. Berning

appeals.

Counsel for Garlie E. Berning who appeals says: "The only

question that arises in the cause at bar is whether the Court was

justified in regarding the trust agreement executed by Garlie E.

Berning as converting the real estate owned by her and conveyed at



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that time to the trustee for her own use and benefit into personal property so that her interest in the beneficial certificate in which she was the sole beneficiary could be sold as personal property."

The record discloses that the trust agreement dated October 21, 1940, recites that Harold L. Feigenholtz, as trustee, is to take title to certain described real estate located in Cook county, Illinois; that the trustee "will hold it for the ultimate use and benefit of" Carrie E. Berning, as the trust agreement provides; and further: "IT IS UNDERSTOOD AND AGREED between the parties hereto, and any person or persons who may become entitled to any interest under this trust, that the interest of any beneficiary shall consist solely of a power of direction to deal with the title to said property and to manage and control said property as hereinafter provided, and the right to receive the proceeds from rentals, and from mortgages, sales or other disposition of said premises and that such right in the avails of said property shall be deemed to be personal property, \* \* \*."

That the trustee will "deal with said real estate only when authorized to do so in writing, and that he will (notwithstanding any change in the beneficiary or beneficiaries hereunder unless otherwise directed in writing by the beneficiary or beneficiaries) on the written direction of GEORGE VOGT, or on the written direction of such person or persons as may be beneficiary or beneficiaries at the time, make deeds for, or otherwise deal with the title to said real estate, provided, however, that the trustee shall not be required to enter into any personal obligation or liability in dealing with said land;" that the beneficiary or beneficiaries shall "have the management of said property and control of the selling, renting and handling thereof, and any beneficiary \* \* \* shall handle the rents thereof and the proceeds of any sales of said property, and said Trustee shall not be called upon to do



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anything in the management of control of said property \*\*\* except on written direction as hereinabove provided, \*\*\*." That "No beneficiary hereunder shall have any authority to contract for or in the name of the trustee or to bind the trustee personally. If any property remains in this trust twenty years from this date it shall be sold at public sale by the trustee on reasonable notice."

Counsel for defendant says that by the terms of the trust agreement no active duties were to be performed by the trustee; that the trust was a passive trust and that under the Statute of Uses (Ill. Rev. Stat. 1943, ch. 30 §3 ) the legal title to the real estate vested in Carrie E. Berning, beneficiary of the trust. We think this contention cannot be sustained. The identical form of trust agreement was considered by another division of this court in Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank, 300 Ill. App.329, where it was held that the imposition by the trust agreement upon trustee of duties to convey or otherwise deal with the title of real estate at the direction of the beneficiary and to sell the property and divide the proceeds among persons entitled if any property remained at the end of 20 years was sufficient to make the trust an active one and prevent the title passing under the statute of uses. In that case the court discussed a number of authorities to sustain its position, with which we agree.

In support of defendant's contention, her counsel cites and discusses McGookey v. Winter, 381 Ill. 516; McNair v. Montague, 260 Ill. 465. We think neither of these cases sustains the contention made.

In the McGookey case it was held that where a husband and wife were having marital difficulty during which time they agreed



anything in the management of control of said property \*\*\* except on written direction as hereinabove provided, \*\*\* That no beneficiary hereunder shall have any authority to contract for or in the name of the trustee or to bind the trustee personally. If any property remains in this trust twenty years from this date it shall be sold at public sale by the trustee on reasonable notice."

Counsel for defendant says that by the terms of the trust agreement no active duties were to be performed by the trustee; that the trust was a passive trust and that under the statute of Uses (Ill. Rev. Stat. 1943, ch. 30 § 3) the legal title to the real estate vested in Carrie E. Bering, beneficiary of the trust. We think this contention cannot be sustained. The identical form of trust agreement was considered by another division of this court in Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank, 300 Ill. App. 329, where it was held that the imposition by the trust agreement upon trustee of duties to convey or otherwise deal with the title of real estate at the direction of the beneficiary and to sell the property and divide the proceeds among persons entitled if any property remained at the end of 20 years was sufficient to make the trust an active one and prevent the title passing under the statute of uses. In that case the court discussed a number of authorities to sustain its position, with which we agree.

In support of defendant's contention, her counsel cites and discusses McGookey v. Winter, 381 Ill. 516; Wheeler v. Montague, 300 Ill. 465. We think neither of these cases sustains the contention made.

In the McGookey case it was held that where a husband and wife were having marital difficulty during which time they agreed

4.

upon a property settlement and executed a warranty deed conveying the wife's real estate to a trustee for the use and benefit of the wife, without any directions to the trustee nor imposing any duties upon him for the sole purpose of carrying the title during the settlement, the legal estate in the property never vested in the trustee by operation of §3, of the Conveyance act, but passed instantly to the cestui que trust. In the instant case, the trustee under the trust agreement had duties to perform as shown by the quotation above, from the trust agreement. The facts and the holding in the McNair case are to the same effect.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

upon a property settlement and executed a warranty deed conveying the wife's real estate to a trustee for the use and benefit of the wife, without any direction to the trustee nor imposing any duties upon him for the sole purpose of carrying the title during the settlement, the legal estate in the property never vested in the trustee by operation of § 2, of the Conveyance act, but passed instantly to the cestui que trust. In the instant case, the trustee under the trust agreement had duties to perform as shown by the quotation above, from the trust agreement. The facts and the holding in the Mohr case are to the same effect. The decree of the Superior court of Cook county is affirmed.

DEFOREST AFFIRMED.

Nieweyer, J., and Macchett, J., concur.



320 I.A. 687<sup>1</sup>

42733

JOSEPHINE LARSON,  
Appellee,

v.

CITY OF CHICAGO, a municipal corporation, and WALTER J. CUMINGS and DANIEL C. GREEN, as Receivers, etc., et al., doing business as CHICAGO SURFACE LINES,  
Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse two orders entered by the Circuit court of Cook county on the 15th day of January and the 3rd day of February, 1943, which set aside an order of March 10, 1942, dismissing the cause on motion of defendants and reinstating it.

The record discloses that June 17, 1941, plaintiff brought an action against defendants to recover for the loss of an eye which she claimed to have sustained on account of the negligence of defendants. Each defendant filed an answer denying liability. March 10, 1942, the following order was entered: "On motion of the defendants it is ordered that this suit be and it is hereby dismissedn without costs." January 15, 1943, pursuant to notice, plaintiff filed her petition under Section 72 of the Civil Practice Act (Ill. Rev. Stat. 1943, ch. 110, §72) and on the same day the court entered an order, viz., "On the agreement of the parties to this suit now here made in open court it is ordered that the order of dismissal heretofore entered herein on March 10, A.D. 1942, be and the same is hereby vacated and set aside and this cause reinstated on the trial call of this court and set for trial

885 I.A. 587

42783

LOUISIANA BAR ASSOCIATION

CITY OF CHICAGO, a municipal corporation, and WILLIAM J. GUINNESS, and DAVID G. GUINNESS, as co-defendants, et al., doing business as CHICAGO LUMBER CO., Inc., Appellants.

15. PRESENTING JUSTICE OF SUPREME COURT OF THE STATE OF ILLINOIS, in his opinion, delivered the following opinion:

By this appeal defendants seek to reverse two orders entered by the Circuit Court of Cook County on the 13th day of January and the 3rd day of February, 1943, which set aside an order of March 10, 1942, dissolving the cause on motion of defendants and reinstating it.

The record discloses that June 17, 1941, plaintiff brought an action against defendants to recover for the loss of an eye which she claimed to have sustained on account of the negligence of defendants. Each defendant filed an answer denying liability. March 10, 1942, the following order was entered: "An action of the defendants it is ordered that this suit be and it is hereby dissolved without costs." January 13, 1943, pursuant to notice, plaintiff filed a petition under Section 72 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, § 72) and on the same day the court entered an order, viz.: "On the agreement of the parties to this suit now pending in open court it is ordered that the order of dismissal heretofore entered herein on March 10, 1942, be and the same is hereby vacated and set aside and this cause reinstated on the trial call of this court and set for trial

2.

on January 18, A.D. 1943." January 28, defendant Chicago Surface Lines, filed its objection to the petition of plaintiff abover referred to; on the next day defendant City of Chicago filed its objections and on February 3, 1943, the following order was entered: "On motion of Emerson C. Whitney, Attorney for plaintiff, both defendants being present by their respective attorneys and after hearing all evidence and argument of all sides, it is hereby ordered that this cause be reinstated as to all parties herein and set for trial March 1, 1943." Each defendant filed a notice of appeal from the orders of January 15 and February 3, 1943.

Plaintiff's verified petition filed under Section 72 set up that the cause was never on the trial call; that on March 9, 1942, the cause appeared in the Chicago Daily Law Bulletin as being on the pre-trial call before Judge LaBuy in Room 741 of the County Building for March 10, 1942, at 10:45 A. M. The notice in the Law Bulletin appeared under the following heading: "Counsel familiar with the case and who are authorized to act shall appear, prepared to advise the Court of the following matters: pending motions, amendments, depositions, stipulations and admissions and matters that may lead to settlements." That this notice was published pursuant to announcements appearing in the Law Bulletin from February 10 to February 19, 1942; that on March 10, 1942, plaintiff's attorney represented plaintiff in the case of Elizabeth Messinger v. The City of Chicago, which was also on the same call before Judge LaBuy; that in that case a deposition was to be taken in Room 602, City Hall, at 11 A. M., March 10, 1942.

The petition further sets up that on or about March 9 or 10, Allen A. Freeman, an attorney associated with plaintiff's attorney and employed by the latter, and who was authorized to act



on January 13, A.D. 1943. "January 28, Defendant Chicago and on  
 lines, filed its objection to the petition of plaintiff's recovery  
 referred to; on the next day defendant City of Chicago filed its  
 objections and on February 3, 1943, the following order was entered:  
 "On motion of Emerson G. Whitney, Attorney for plaintiff, both  
 defendants being present by their respective attorneys and after  
 hearing all evidence and argument of all sides, it is hereby ordered  
 that this cause be reinstated as to all parties herein and set for  
 trial March 1, 1943." Each defendant filed a notice of a plea  
 from the orders of January 13 and February 3, 1943.  
 Plaintiff's verified petition filed under section 72 set up  
 that the cause was never on the trial call; that on March 1, 1943,  
 the cause appeared in the Chicago Daily Law Bulletin as being on  
 the pre-trial call before Judge Labov in Room 741 of the County  
 Building for March 10, 1943, at 10:45 A.M. The notice in the  
 Law Bulletin appeared under the following heading: "General  
 familiar with the case and who are authorized to act shall appear,  
 prepared to advise the Court of the following matters: pending  
 motions, amendments, depositions, stipulations and admissions and  
 matters that may lead to settlements." That this notice was  
 published pursuant to an undertaking appearing in the Law Bulletin  
 from February 10 to February 19, 1943; that on March 10, 1943,  
 plaintiff's attorney represented plaintiff in the case of  
 Elizabeth Mesinger v. The City of Chicago, which was also on the  
 same call before Judge Labov; that in that case a deposition was  
 to be taken in Room 802, City Hall, at 11 A.M., March 10, 1943.  
 The petition further sets up that on or about March 9  
 or 10, Allen A. Freeman, an attorney associated with plaintiff's  
 attorney and employed by the latter, and who was authorized to act

3.

in the instant case before Judge LaBuy, spoke to one of the attorneys for defendant City with respect to the two cases on the pre-trial call before Judge LaBuy and that as a result of the conversation, Attorney Freeman, who was ill and unable to answer the call, understood that the attorney for the City would request to have both cases continued. That plaintiff's attorney believed the cases had been continued and diligently watched the calls before Judge LaBuy, and afterward before Judge Fisher, who was then calling that calendar, but the case did not appear on Judge Fisher's pre-trial call; that about December 29, 1942, an examination was made of the records and for the first time it was learned that the cause had been dismissed on March 10, 1942, for want of prosecution.

The Surface Lines filed its verified objections to the petition, the substance of which is that on March 10, 1942, the cause appeared in regular order on the pre-trial calendar of Judge LaBuy who at that time was acting as assignment judge of the Circuit court; that under the rules of that court and the Civil Practice Act, and the rules of the Supreme court, all cases reached upon the pre-trial calendar were subject to dismissal for want of prosecution in the event that plaintiff did not appear. That when the case was called before Judge LaBuy, no one appeared for plaintiff; that the court waited a considerable time and the suit, on motion of defendant, was dismissed. That the Surface Lines did not agree to any continuance: that January, 1943, the attorneys for plaintiff appeared before Judge Fisher and stated that defendant was the City of Chicago and did not object to the reinstatement of the cause but that the court was not apprised that the Surface Lines was also a party defendant and plaintiff did not have its consent to reinstatement. The verified objections of the City to the petition set up the rules of court which authorized the dismissal

in the instant case before Judge Lamy, spoke to one of the attorneys for defendant City with respect to the two cases on the pre-trial call before Judge Lamy and that as a result of the conversation, Attorney Freeman, who was ill and unable to answer the call, understood that the attorney for the City would request to have both cases continued. That plaintiff's attorney believed the cases had been continued and diligently watched the calls before Judge Lamy, and after and before Judge Fisher, who was then calling that calendar, but the case did not appear on Judge Fisher's pre-trial call; that about December 29, 1942, an examination was made of the records and for the first time it was learned that the case had been dismissed on March 10, 1942, for want of prosecution. The Surface Lines filed its verified objections to the petition, the substance of which is that on March 10, 1942, the case appeared in regular order on the pre-trial calendar of Judge Lamy who at that time was acting as assignment judge of the Circuit court; that under the rules of that court and the Civil Practice Act, and the rules of the Supreme court, all cases reached upon the pre-trial calendar were subject to dismissal for want of prosecution in the event that plaintiff did not appear. That when the case was called before Judge Lamy, no one appeared for plaintiff; that the court waited a considerable time and the suit, on motion of defendant, was dismissed. That the Surface Lines did not agree to any continuance: that January, 1943, the attorneys for plaintiff appeared before Judge Fisher and stated that defendant was the City of Chicago and did not object to the reinstatement of the case but that the court was not advised that the Surface Lines was also a party defendant and plaintiff did not have its consent to reinstatement. The verified objections of the City to the petition set up the rules of court which authorized the dismissal



4.

of a cause on a pre-trial calendar for want of prosecution in the event plaintiff did not appear. That when the case was called before Judge LaBuy no one appeared for plaintiff and that on motion of the Surface Lines the cause was dismissed. That the Surface Lines did not agree to any continuance. That afterward attorneys for plaintiff in January, 1943, appeared before Judge Fisher who was then acting as assignment Judge, who stated that defendant was the City of Chicago and did not object to the reinstatement but did not apprise the court that the Surface Lines was also a defendant.

The report of proceedings recites the orders of March 10, 1942, January 15 and February 3, 1943, and includes the petition filed by plaintiff under section 72 and the objections filed by each of the defendants, at the conclusion of which appears the following: "Mr. Whitney: I would like to have the record show that Allen A. Freeman testified to the facts set forth in the petition; that Warner H. Robinson testified to the facts set forth in the objections on behalf of defendants doing business as Chicago Surface Lines and that Samuel Allen testified to the facts set forth in the objections on behalf of defendant, City of Chicago. The Court: The record will so show." Then follows a copy of the order of February 3, the exceptions of defendants to the entry of this order and certificate in the usual form, signed by the judge, that it includes all the evidence heard, etc.

From the briefs and argument it appears that the three witnesses mentioned in the report of proceedings did testify before the judge. And upon a consideration of all the evidence we think the court did not abuse his discretion in setting aside the order of dismissal and reinstating the cause. Chapman v.

of a cause on a pre-trial calendar for some of protection in the event plaintiff did not appear. That was the only one filed before Judge Lacey no one appeared for plaintiff and that on motion of the defense lines the cause was dismissed. That the defense lines did not agree to any continuance. That attorneys for plaintiff in January, 1945, appeared before Judge Fisher who was then acting as assignment judge, who stated that defendant was the City of Chicago and did not object to the reinstatement but did not appear the court held the defense lines was also a defendant.

The report of proceedings recites the order of March 10, 1945, January 18 and February 8, 1945, and includes the petition filed by plaintiff under section 27 and the objections filed by each of the defendants, at the conclusion of which appears the following: "Mr. Attorney: I would like to have the record show that Allen A. Robinson testified we two facts set forth in the petition; that Ernest H. Robinson testified to the facts set forth in the objections on behalf of defendants doing business as Chicago Defense Lines and that Samuel Allen testified to the facts set forth in the objections on behalf of defendant, City of Chicago. The court: The record will so show. Then follows a copy of the order of February 8, the acceptance of defendant to the entry of this order and certificate in the usual form, signed by the judge, that it includes all the evidence taken etc.

From the briefs and argument it appears that the three witnesses mentioned in the report of proceedings did testify before the judge. And upon a consideration of all the evidence we think the court did not abuse his discretion in setting aside the order of dismissal and reinstating the cause. Robinson v. Chicago

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No. Amer. Ins. Co., 292 Ill. 179; People v. Crooks, 326 Ill. 266; Jacobson v. Ashkinaze, 337 Ill. 141; McCord v. Briggs & Turivas, 338 Ill. 158; Toth v. Phillipson, 250 Ill. App. 247; Lake View Tr. & Svs. Bank. v. City of Chicago, 314 Ill. App. 386, (abst.)

In the Chapman case the court said: "At common law the writ of error coram nobis could be sued out of the same court when a judgment at law was rendered to reverse the judgment, and before the same judge who rendered the judgment, for an error of fact that might be brought to the knowledge of the court that would be sufficient, of itself, to defeat the judgment."

In the Crooks case, in discussing the procedure under §89 (now §72, of the Practice act) the court said (p.280): "Errors of fact which may be availed of on a writ of error coram nobis or under a motion made in pursuance of section 89 of our Practice act includes duress, fraud and excusable mistake," and cites other cases holding an "excusable mistake without negligence" is sufficient grounds to sustain a motion under section 72.

And in the Toth case (250 Ill. App. 247) where a suit had been dismissed for want of prosecution and reinstated under section 89 of the Practice act, the court held that an order dismissing a cause for want of prosecution on the misapprehension that plaintiff had not appeared for trial, when in fact the clerk of the attorney had appeared to answer the trial call and by mistake of the clerk of the court, was informed that the case was continued, this would constitute a mistake warranting the setting aside of the dismissal.

And in the Lake View Tr. & Savings Bank case, (314 Ill. App. 386, abst.) where suit was dismissed November 6, 1936, and a motion was made under section 72 of the Civil Practice Act March, 1941, the facts set up in the motion, if found to be true,



Ex. Amer. Ins. Co., 202 Ill. 179; People v. Crocker, 226 Ill. 200;  
Leopold v. A. H. H. H., 237 Ill. 141; McDonnell v. H. H. H. H.,  
 238 Ill. 156; Toth v. Phillips, 230 Ill. App. 247; Lake View  
Tr. & Savs. Bank v. City of Chicago, 214 Ill. App. 336, (abst.)

In the Chapman case the court said: "At common law the writ of error coram nobis could be used out of the same court when a judgment at law was rendered to reverse the judgment, and before the same judge who rendered the judgment, for an error of fact that might be brought to the knowledge of the court that would be sufficient, of itself, to defeat the judgment."

In the Crocker case, in discussing the procedure under §89 (now §72, of the practice act) the court said (p. 200): "Errors of fact which may be availed of on a writ of error coram nobis or under a motion made in pursuance of section 89 of our practice act includes duress, fraud and excusable mistake," and cites other cases holding an "excusable mistake without negligence" is sufficient grounds to sustain a motion under section 72. And in the Toth case (230 Ill. App. 247) where a writ had been dismissed for want of prosecution and reinstated under section 89 of the practice act, the court held that an order dismissing a cause for want of prosecution on the misapprehension that plaintiff had not appeared for trial, when in fact the clerk of the attorney had appeared to answer the trial call and by mistake of the clerk of the court, was informed that the case was continued, this would constitute a mistake warranting the setting aside of the dismissal.

And in the Lake View Tr. & Savs. Bank case, (214 Ill. App. 336, abst.) where writ was dismissed November 6, 1936, and a motion was made under section 72 of the Civil Practice Act March, 1941, the facts set up in the motion, it found to be true,

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were sufficient to set aside the order of dismissal. The substance of the facts, as appear from the motion were that after the suit was filed another case was pending in the Supreme court which involved the same question and the attorneys entered into an oral stipulation that if the case should appear on the trial call before the decision of the Supreme court, it should be stricken from the trial call, and after the decision of the Supreme court of the question involved, a judgment might be entered under the holding of the Supreme court. The case appeared November 6, 1936 under article of the Circuit court concerning cases not noticed for trial within 2 years after they were commenced. The parties relied upon the oral stipulation, neither appeared on the call and the suit was dismissed. Afterward the test case was decided by the Supreme court and the petition filed. It was held that the petition set up sufficient facts to warrant the court to set aside the order of dismissal.

In the instant case the record discloses that the day before the case was on Judge LaBuy's pre-trial call, attorney for plaintiff, who was ill at the time, advised an assistant corporation counsel of Chicago of this fact and that he would be unable to appear before Judge LaBuy on whose call the instant case and another case against the City appeared and it was agreed that the matters might be continued on the pre-trial calendar. If this had been brought to the attention of the trial judge, obviously the case would not have been dismissed at that time although counsel for the Surface Lines did not know of the telephone conversation between counsel. Moreover, the notice which appeared in the Law Bulletin was that counsel should appear prepared to advise the court of the following matters: pending motions, amendments, depositions,

were sufficient to set aside the order of dismissal. The motion of the facts, as appear from the motion were that after the case was filed another case was pending in the same court which involved the same question and the attorneys entered into an oral stipulation that if the case should appear on the trial call before the decision of the Supreme Court, it should be stipulated from the trial call, and after the decision of the Supreme Court of the question involved, a judgment might be entered under the holding of the Supreme Court. The case appeared November 8, 1938 under a name of the Circuit Court concerning cases not noticed for trial within 2 years after they were commenced. The parties relied upon the oral stipulation, neither appeared on the call and the case was dismissed. Afterward the test case was decided by the Supreme Court and the petition filed. It was held that the petition set up sufficient facts to warrant the court to set aside the order of dismissal.

In the instant case the record disclosed that the day before the case was on Judge Laby's pre-trial call, attorney for plaintiff, who was ill at the time, advised an assistant corporation counsel of Chicago of the fact and that he would be unable to appear before Judge Laby on whose call the instant case and another case against the City appeared and it was agreed that the matter might be continued on the pre-trial calendar. At this time been brought to the attention of the trial judge, obviously the case would not have been dismissed at that time although counsel for the Service Lines did not know of the telephone conversation between counsel. Moreover, the notice which appeared in the law Bulletin was that counsel should appear prepared to advise the court of the following matters: pending motions, amendments, depositions,



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stipulations and admissions and matters that may lead to settlements." No one would gather from this announcement that the cause would be dismissed, even if he had in mind the rules of the Circuit and Supreme courts, above referred to, because the announcement in the Bulletin was to consider the matters above quoted. Such announcement we think, would not warrant the court in dismissing the action.

The orders of the Circuit court of Cook county appealed from are affirmed.

ORDERS AFFIRMED.

Matchett, J., concurs:

Niemeyer, J. Dissenting in part:

The petition to vacate the order of dismissal states conclusions, not facts. If the undisclosed facts relating to the conversation between Freeman and the unnamed representative of the City of Chicago were sufficient to justify Freeman's conclusion that the attorney for the City would request a continuance of the case, the defendant Surface Lines was not affected by that arrangement. As between the plaintiff and the Surface Lines the attorney for the City became the agent for plaintiff for the purpose of procuring a continuance. His mistake or neglect was the mistake or neglect of plaintiff. No attempt was made to excuse it. This case is squarely within McCord v. Briggs & Turivas, 338 Ill. 158, cited in the majority opinion, where the court said (p.167): "The motion or petition under section 89 (now 72) of the Practice act is not intended to relieve a party from the consequences of his own mistake or negligence. Cramer v. Commercial Men's Ass'n., 260 Ill. 516.)"

If the trial court was not warranted in dismissing the action on the pre-trial call, the error in that respect cannot be

regulations and a mission and matters that may lead to settlements." No one would gather from this announcement that the cause would be dismissed, even if he had in mind the rules of the Circuit and Supreme courts, above referred to, because the announcement in the Bulletin was to consider the matter above quoted. Such announcement we think, would not prevent the court in dismissing the action.

The orders of the Circuit court of Cook county respecting from are affirmed.

ORDER AFFIRMED.

Wheat, J., concurs:  
Dissenting in part:

The petition to vacate the order of dismissal stated conclusions, not facts. If the undisputed facts relating to the conversation between Freeman and the unnamed representative of the City of Chicago were sufficient to justify Freeman's conclusion that the attorney for the City would repeat a continuance of the case, the defendant Surface Lines was not affected by that arrangement. As between the plaintiff and the Surface Lines the attorney for the City became the agent for plaintiff for the purpose of procuring a continuance. His mistake or neglect was the mistake or neglect of plaintiff. No attempt was made to excuse it. This case is adversely affected by Wheat v. City of Chicago, 200 Ill. 108, cited in the majority opinion, where the court said (p. 107): "The motion or petition under section 23 (now 72) of the practice act is not intended to relieve a party from the consequences of his own mistake or negligence. Granger v. Commonwealth, 200 Ill. 216."

If the trial court was not warranted in dismissing the action on the pre-trial call, the error in that regard cannot be

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corrected by the trial court acting under section 72 of the Practice act. In Chapman v. North American Ins. Co., 292 Ill. 179, also cited in the majority opinion, the court said (p. 189):

\*\*\*\* the court was without right or power to set aside its judgment for any error of its own, whether as to matters of fact or as to matters of law. Such errors could only be considered by a reviewing court on a writ of error proper for such purpose. Error coram nobis does not lie \*\*\* to correct any error in the judgment of the court."

For these reasons the orders appealed from should be reversed as to the defendant Surface Lines. As to the City of Chicago it appears that the order of January 15, 1943, vacating the order of dismissal and setting the case for trial, was entered with its consent, and that order should stand.



corrected by the trial court sitting under section 72 of the Practice act. In Chapman v. North American Ins. Co., 232 Ill. 173, also cited in the majority opinion, the court said (p. 183):

\*\*\* the court was without right or power to set aside its judgment for any error of its own, whether as to matters of fact or as to matters of law. Such errors could only be considered by a reviewing court on a writ of error proper for such purpose.

Error coram nobis does not lie \*\*\* to correct any error in the judgment of the court."

For these reasons the orders appealed from should be reversed as to the defendant Surface Lines. As to the City of Chicago it appears that the order of January 10, 1913, vacating the order of dismissal and setting the case for trial, was entered with its consent, and that order should stand.

42678

LUCY W. DOBSON,

Appellant -- Cross-Appellee,

v.

ROBERT B. DOBSON,

Appellee-- Cross-Appellant.

320 I.A. 687

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT delivered the opinion of the court.

This appeal is by Lucy W. Dobson to reverse a decree entered October 20, 1942, in favor of her former husband, Robert B. Dobson, amending and modifying a former decree entered on April 17, 1942. Mr. Dobson has filed a cross-appeal to reverse the decree of April 17, 1942. She has moved to dismiss his cross-appeal. Her motion has been reserved to the hearing.

The uncontroverted facts are as follows. Robert B. and Lucy W. Dobson were husband and wife. Lucy W. filed a bill in the Circuit Court of Cook County, where both lived, praying for a divorce. He filed a cross-bill against her praying for divorce on the charge of desertion. On March 8, 1929, a divorce was granted on his cross-bill. The parties owned jointly two parcels of income-producing property in Chicago, a 21-apartment building at 3308-10 Maypole Avenue and an 8-apartment building at 3312 Maypole Avenue. Paragraph 4 of the decree was:

"That the parties hereto have entered into an agreement in open court, settling and adjusting their respective property rights and the rights, claims and demands of the complainant and cross-defendant to support and alimony from the said defendant and cross-complainant; that under the terms of said agreement the defendant and cross-complainant has agreed to pay to the complainant and cross-defendant the sum of nine thousand dollars (\$9000.00) in the following manner: the sum of two thousand five hundred dollars (\$2500.00) in cash upon the date of the entry of this decree; the balance of six thousand five hundred dollars (\$6500.00) in thirty-six (36) equal monthly installments, evidenced by notes and secured by a second mortgage upon the property owned by the said defendant and cross-complainant, said delayed payments

30014.687

LUCY V. JOHNSON

Appellant - Cross-Appellant

v.

JOHN A. JOHNSON

Appellee - Cross-Appellant

W. J. JUSTICE delivered the opinion of the court.

This appeal is by Lucy A. Johnson to reverse a decree

entered October 30, 1942, in favor of her former husband, John

A. Johnson, amending and modifying a former decree entered on

April 17, 1932. Mr. Johnson has filed a cross-appeal to reverse

the decree of April 17, 1942. She has moved to dismiss the cross-

appeal. Her motion has been reserved to the hearing.

The uncontested facts are as follows. Robert E. and

Lucy A. Johnson were husband and wife. Lucy A. filed a bill in the

Circuit Court of Cook County, where both lived, praying for a

divorce. He filed a cross-bill against her praying for divorce and

the charge of desertion. On March 8, 1932, a divorce was granted

on his cross-bill. The parties owned jointly two parcels of

income-producing property in Chicago, a 21-apartment building at

3308-10 Maypole Avenue and an 8-apartment building at 3513 Maypole

Avenue. Paragraph 1 of the decree was:

"That the parties hereto have entered into an agreement in open court, settling and adjusting their respective property rights and the rights, claims and demands of the complainant and cross-defendant to support and alimony from the said defendant and cross-complainant; that under the terms of said agreement the defendant and cross-complainant has agreed to pay to the complainant and cross-defendant the sum of nine thousand dollars (\$9000.00) in the following manner: the sum of two thousand five hundred dollars (\$2500.00) in cash upon the date of the entry of this decree; the balance of six thousand five hundred dollars (\$6500.00) in thirty-six (36) equal monthly installments, evidenced by notes and secured by a second mortgage upon the property owned by the said defendant and cross-complainant, said debt payable



bearing interest at the rate of six per cent (6%) for amounts due and unpaid from time to time; that in consideration therefor the complainant and cross-defendant has agreed to forever release and discharge any and all rights, claims or demands that she now has or may hereafter acquire for alimony and support from the said defendant and cross-complainant, and further releases and discharges any and all rights, claims, interests or demands that she now has or may hereafter acquire in and to the property of the defendant and cross-complainant, real, personal or mixed, which he now owns or may hereafter acquire, and especially in and to the property known as 3308-3310 Maypole Avenue, and 3312 Maypole Avenue, in the City of Chicago, County of Cook and State of Illinois, together with all personal property therein contained."

The decree also directed that Mr. Dobson should pay to her \$600 in full of solicitor's fees and expenses incurred in the cause; recited she was a suitable person to have their child, a daughter five years of age, and that he should pay the sum of \$12 per week as a proper amount for the support and maintenance of the child.

Mrs. Dobson promptly made a deed of the parcels of real estate, including release and waiver of her dower and right of homestead. He paid the solicitor's fees and promptly executed and delivered to her the notes secured by a second mortgage. For a time he promptly paid the notes as they fell due. On October 15, 1930, she re-married. December 29, 1930, he ceased to make payments on the notes. There was then due on principal and interest the sum of \$3,260.

February 18, 1941, Mrs. Dobson filed her petition for a rule on her former husband to show cause why he should not be held in contempt of court for his failure to pay as decreed. The rule was entered. He answered. On the day she filed her petition for a rule to show cause, he filed his petition for an order that his obligations to pay under the decree be cancelled and satisfied by reason of her remarriage, etc. She answered. September 19, 1941, after hearing, an order was entered dismissing his petition and no appeal has been taken from the order. September 20, 1941, she filed an amendment praying for an order for additional attorney's fees for prosecuting

bearing interest at the rate of six per cent (6%) per annum from time to time; that in consideration therefor the complainant and cross-defendant have agreed to forever release and discharge any and all rights, claims or demands that she now has or may hereafter acquire for alimony and support from the defendant and cross-complainant, and further release and discharge any and all rights, claims, interests or demands that she now has or may hereafter acquire in and to the property of the defendant and cross-complainant, real, personal or mixed, which he now owns or may hereafter acquire, and especially in and to the property known as 3201-3210 Maple Avenue, and 3212 Maple Avenue, in the City of Chicago, County of Cook and State of Illinois, together with all personal property therein contained."

The decree also directed that Mr. Johnson should pay to her \$500 in full of solicitor's fees and expenses incurred in the cause; that she was a suitable person to have the custody of the children, and that he should pay for her and the children as a proper amount for the support and maintenance of the children. Mrs. Johnson promptly made a bond of the release of property, including release and waiver of her own and right of reinstatement. He paid the solicitor's fees and promptly executed and delivered to her the notes secured by a second mortgage. For a time he promptly paid the notes as they fell due. On October 10, 1930, the re-arbitrated. December 28, 1930, he ceased to make payments on the notes. There was then due on principal and interest the sum of \$3,950. February 18, 1941, Mrs. Johnson filed her petition for a rule on her former husband to show cause why he should not be held in contempt of court for his failure to pay as directed. The rule was entered. He answered. On the day the filed her petition for a rule to show cause, he filed his petition for an order that his obligations to pay under the decree be cancelled and satisfied by reason of her remarriage, etc. He answered. September 19, 1941, after hearing, an order was entered dismissing his petition and no appeal had been taken from the order. September 30, 1941, she filed an answer went praying for an order for additional attorney's fees for prosecuting

3.

the rule to show cause. He answered. The petitions were referred to a master. On March 6, 1942, she, through the same attorney, filed her suit, 42-C-2351, in the Circuit Court to foreclose the second mortgage. March 10, 1942, the master made his report on the reference on the rule to show cause. In her suit to foreclose the second mortgage on the return day of the summons (April 6, 1942), Mr. Dobson made a tender in the Circuit Court of the entire balance due on the notes, principal of \$3,260 with interest at the rate of 6% amounting to \$2,212.42, costs and attorney's fees of \$100, a total of \$5,612.92. Judge Rush entered an order reciting the tender, its acceptance by Mrs. Dobson and dismissed the foreclosure suit.

In the reference on the petitions to show cause, etc., the master reported that the total income of the respondent from March, 1935, to November 1, 1941, was \$11,284.83, with free rent to the value of \$42.50 per month. The net income over expenses was \$1,284.83. The respondent had failed to explain how the net profits from the apartments of \$1,284.83 had been disbursed. He took judicial notice of the fact that \$125 per month, which the respondent received as salary, was used for living expenses. He held that the \$1,284.83 should have been applied in payment of the alimony. He found that Mr. Dobson was guilty of contempt. He also found the petitioner was entitled to receive payment of attorneys' fees for 18½ hours in court at \$15 per hour and for 89½ hours in preparation of brief and hearings before the master at \$10 per hour, a total sum of \$1,172.50. The report was filed. Objections were overruled and stood as exceptions.

While the report was pending the respondent, Mr. Dobson, filed a supplemental plea setting up the payment of \$5,612.92 in the foreclosure suit and averring that this amounted to a full satisfaction of his indebtedness to Mrs. Dobson. She made a motion to strike the plea. The motion to strike was denied. Judge Finnegan entered a decree on the report on April 17, 1942. The decree recited the payment



the rule to show cause. He answered. The petitions were referred to a master. On March 6, 1942, she, through the same attorney, filed her suit, 42-6-2331, in the Circuit Court to foreclose the second mortgage. March 10, 1942, the master made his report on the reference on the rule to show cause. In her suit to foreclose the second mortgage on the return day of the summons (April 6, 1942), Mr. Dobson made a tender in the Circuit Court of the entire balance due on the notes, principal of \$3,260 with interest at the rate of 6% amounting to \$2,212.42, costs and attorney's fees of 100, a total of \$5,572.42. Judge Rush entered an order reciting the tender, its acceptance by Mrs. Dobson and dismissed the foreclosure suit.

In the reference on the petitions to show cause, etc., the master reported that the total income of the respondent from March, 1935, to November 1, 1941, was \$1,284.83, with free rent to the value of \$2.50 per month. The net income over expenses was \$1,284.83. The respondent had failed to explain how the net profits from the respondent of \$1,284.83 had been disbursed. He took judicial notice of the fact that 125 per month, which the respondent received as salary, was used for living expenses. He held that the \$1,284.83 should have been applied in payment of the alimony. He found that Mr. Dobson was guilty of contempt. He also found the petitioner was entitled to receive payment of attorneys' fees for 18 1/2 hours in court at \$5 per hour and for 89 1/2 hours in preparation of brief and hearings before the master at \$10 per hour, a total sum of \$1,725.00. The report was filed. Objections were overruled and stood as exceptions.

While the report was pending the respondent, Mr. Dobson, filed a supplemental plea setting up the payment of \$5,572.92 in the foreclosure suit and averring that this amounted to a full satisfaction of his indebtedness to Mrs. Dobson. She made a motion to strike the plea. The motion to strike was denied. Judge Finnegan entered a decree on the report on April 17, 1942. The decree recited the payment

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by Mr. Dobson of \$5,612.92 and found respondent should be given credit therefor. The decree allowed Mrs. Dobson an item of \$121 taxed against respondent for court reporter's fees and other items of costs, including master's fees of \$314.85. It also found the respondent to be in contempt. It allowed attorneys' fees to the amount of \$1,172.50. This is the decree which the cross-appeal asks shall be reversed.

May 6, 1942, respondent filed his petition to have the decree of April 17, 1942, modified. Mrs. Dobson filed a motion to strike the petition. On October 20, 1942, the court overruled the motion to strike and sustained the motion of defendant to modify. He found Mrs. Dobson had paid her solicitors \$1,400 but reduced the allowance for solicitors' fees on the contempt matter to \$200 and her costs and stipulated expenses to \$60. From this order she appeals.

We find nothing in the record which from a legal standpoint justifies the amendment of the decree or any grounds on which the decree of April 17, 1942, should be reversed. Mr. Dobson makes the point that the court was without jurisdiction to determine the issues raised by the petition for rule to show cause. He cites Becker v. Becker, 79 Ill. 532, and Rybakowicz v. Rybakowicz, 290 Ill. 550. In the Becker case it was held error to decree that payment of alimony should draw interest at the rate of 10% since the law at that time provided that judgments and decrees should draw interest at 6%. In that case there was a direct challenge of the divorce decree by writ of error. Here, there is no attack on the original decree which, in so far as alimony is concerned, was by agreement and consent of both parties and the benefits of which Mr. Dobson still enjoys. The cases are clearly distinguishable. Mr. Dobson says that disobedience of a decree which merely approves a property settlement is not punishable by contempt. He cites 27 C. J. 8, 1153. This may be conceded. We

by Mr. Dobson of \$,612.92 and found respondent should be given credit

therefor. The decree allowed Mrs. Dobson an item of \$121 taxes

against respondent for court reporter's fees and other items of costs,

including master's fees of \$14.82. It also found the respondent

to be in contempt. It allowed attorney's fees to the amount of

\$1,172.50. This is the decree which the cross-appeal asks shall be

reversed.

May 6, 1942, respondent filed his petition to have the

decree of April 17, 1942, modified. Mrs. Dobson filed a motion to

strike the petition. On October 20, 1942, the court overruled the

motion to strike and sustained the motion of defendant to modify. He

found Mrs. Dobson had paid her solicitors \$1,400 but reduced the

allowance for solicitors' fees on the contempt matter to \$200 and her

costs and stipulated expenses to \$80. From this order she appeals.

We find nothing in the record which from a legal standpoint

justifies the amendment of the decree or any grounds on which the

decree of April 17, 1942, should be reversed. Mr. Dobson makes the

point that the court was without jurisdiction to determine the issues

raised by the petition for rule to show cause. He cites Becker v.

Becker, 79 Ill. 528, and Hypokowicz v. Hypokowicz, 290 Ill. 550. In

the Becker case it was held error to decree that payment of alimony

should draw interest at the rate of 10% since the law at that time

provided that judgments and decrees should draw interest at 6%. In

that case there was a direct challenge of the divorce decree by writ

of error. Here, there is no attack on the original decree which, in

so far as alimony is concerned, was by agreement and consent of both

parties and the benefits of which Mr. Dobson still enjoys. The cases

are clearly distinguishable. Mr. Dobson says that disabedience of a

decree which merely approves a property settlement is not punishable

by contempt. He cites 27 C. J. 8, 1152. This may be conceded. We



5.

have recited above the pertinent parts of the divorce decree which in essence provided for the payment of alimony. We hold it was enforceable by contempt. Cavanaugh v. Cavanaugh, 106 Ill. App. 209. The mere fact that the original decree provided the payments to be made by way of alimony should be secured by a second mortgage giving a lien on lands which the parties had theretofore owned jointly did not deprive the court of its power to enforce payment by contempt process. Wightman v. Wightman, 45 Ill. 167; O'Callaghan v. O'Callaghan, 69 Ill. 552.

It is urged the acceptance of the tender in the mortgage foreclosure bars the contempt action. The process for contempt and the process for foreclosure were not inconsistent. Mrs. Dobson clearly had both rights. She was for a time restrained by order of the Federal court from pursuing her right. The order was entered in a proceeding brought by Mr. Dobson under Section 74 of the Bankruptcy Act, in which he sought to have his obligations under this decree released. He was not successful but he did secure delay. Mrs. Dobson had a right to pursue both remedies since they were not inconsistent. Fleming v. Dillon, 370 Ill. 325, 331.

It is said, however, she was entitled to only one satisfaction. This is quite true, but Mrs. Dobson has not yet received that satisfaction. His position in this regard is not well taken. The report of the master shows, and the evidence is conclusive, that defendant continuously for more than ten years had in his hands money which in good conscience he should have applied to the satisfaction of this decree. He did not so apply it. By his contumacity he compelled Mrs. Dobson to use the remedies provided by law against him. She was entitled while the decree was unpaid to bring the contempt proceeding, and he has been found guilty. Mrs. Dobson was also entitled to foreclose. She was entitled to recover reasonable solicitors' fees and her costs incurred in actions which his failure to comply with the

have recited above the pertinent parts of the divorce decree which in essence provided for the payment of alimony. It would be an enforceable by contempt. Gavannah v. Gavannah, 100 Ill. App. 2d. The mere fact that the original decree provided the payment of alimony by way of alimony should be secured by a second mortgage giving a lien on lands which the parties had theretofore owned jointly did not deprive the court of its power to enforce payment by contempt process. Wrightman v. Wrightman, 46 Ill. 127; O'Dell v. O'Dell, 63 Ill. 282. It is urged the acceptance of the tender in the foregoing foreclosure bars the contempt action. The process for contempt and the process for foreclosure were not inconsistent. Mrs. Johnson clearly had both rights. She was for a time restrained by order of the Federal court from pursuing her right. The order was entered in a proceeding brought by Mr. Johnson under Section 7 of the bankruptcy act, in which he sought to have his obligations under this decree released. He was not successful but he did secure delay. Mrs. Johnson had a right to pursue both remedies since they were not inconsistent. Flaming v. Dillon, 270 Ill. 325, 321. It is said, however, she was entitled to only one action. This is quite true, but Mrs. Johnson has not yet received that satisfaction. His position in this regard is not well taken. The report of the master shows, and the evidence is conclusive, that defendant continuously for more than ten years had in his hands money which in good conscience he should have applied to the satisfaction of this decree. He did not so apply it. By his conduct he was guilty of fraud to use the remedies provided by law against him. He was entitled while the decree was unpaid to bring the contempt proceeding and he has been found guilty. Mrs. Johnson was also entitled to foreclose. She was entitled to recover reasonable solicitors' fees and her costs incurred in actions which his failure to comply with the

decree made necessary. Slezak v. Slezak, 293 Ill. App. 489. The master found Mrs. Dobson was entitled to recover \$1,172.50 on account of attorneys' fees. The uncontradicted evidence showed she had paid even more than this amount. The evidence also showed the amount of service performed by the attorney in hours and the customary and usual value of such services. No evidence was offered to the contrary. She was also entitled to her costs. We appreciate the feelings of Mr. Dobson in failing to enjoy the privilege of paying alimony to his former wife, now the wife of another. This does not change the law applicable to the case. She was entitled to recover her costs and reasonable solicitors' fees. Mr. Dobson was entitled to have the decree of April 17, 1942 reviewed. Her motion to dismiss his cross-appeal will be denied. The decree of October 20, 1942, modifying the former decree will be reversed; the decree of April 17, 1942, affirmed.

DECREE OF OCTOBER 20, 1942 REVERSED  
DECREE OF APRIL 19, 1942 AFFIRMED.



O'Connor, P.J., and Niemeyer, J., concur.



George made necessary. Blanch v. Blane, 205 Ill. 409. The master found that Johnson was entitled to recover \$1,175.00 on account of attorneys' fees. The uncontradicted evidence showed that he had paid even more than this amount. The evidence also shows the amount of service performed by the attorney in house and the custody and value of such services. No evidence was offered to the contrary. She was also entitled to her costs. We appreciate the fact that Mr. Johnson in failing to enjoy the privilege of paying attorney to his former wife, now the wife of another. This does not change the law applicable to the case. She was entitled to recover her costs and reasonable attorneys' fees. Mr. Johnson was entitled to have the decree of April 17, 1943 reversed. Her motion to dismiss the cross-appeal will be denied. The decree of October 20, 1942, modifying the former decree will be reversed; the decree of April 17, 1943, affirmed.

DECREE OF OCTOBER 20, 1942 REVERSED  
DECREE OF APRIL 17, 1943 AFFIRMED

O'Connor, P.J., and Newmyer, J., concur.

42711

320 I.A. 688

WALTER HAMILTON,  
Petitioner and Appellant,

v.

COUNTRY CLUB PROPERTIES, INC., a corporation,  
Defendant and Appellee,

TRUST COMPANY OF CHICAGO,  
Supplemental Defendant and  
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On April 17, 1942, Hamilton recovered judgment for default of answer in the Superior Court of Cook County against Country Club Properties, Inc., for \$1,718.18 and costs. Execution issued and was returned nulla bona. May 21, 1942, the judgment creditor filed his petition "for issuance of the citation", in which the recovery of the judgment, the issuance of the execution and its return were stated. The third paragraph of the petition recited that the petitioner believed the Trust Company of Chicago, named supplemental defendant, "has property of the defendant not exempt from execution or garnishment" and is "indebted to the defendant in an amount not exempt by law from garnishment". The petition continued: "Plaintiff claims a right to examine under oath the supplemental defendant and prays the court to issue a citation against it returnable on the Third Monday of June, 1942, \* \* \* and for such further relief as the case may require".

Upon the filing of this petition an order was entered reciting that fact and that upon due notice to the attorney for defendant "It Is Hereby Ordered that citation issue from this Court directed to the Sheriff of Cook County to serve, directing the supplemental defendant, Trust Company of Chicago, a corporation, to appear in

320 I.A. 688

42711

WALTER HAMILTON,  
Petitioner and Appellant,

v.

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Defendant and Appellee,

TRUST COMPANY OF CHICAGO,  
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"Plaintiff claims a right to examine under oath the supplemental  
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further relief as the case may require".

Upon the filing of this petition an order was entered reciting

that fact and that upon due notice to the attorney for defendant  
"It is hereby ordered that citation issue from this Court directed  
to the Sheriff of Cook County to serve, directing the supplemental  
defendant, Trust Company of Chicago, a corporation, to appear in



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this Court and be examined under oath to discover assets of the Country Club Properties, Inc., a corporation, judgment debtor," etc.

The summons issued on the same day, It recited: "To the above named supplemental defendant: You are hereby summoned to answer the petition for citation to discover the assets of the defendant in the above entitled cause." It further stated: "If you do not appear according to the command of this writ, you may be proceeded against as for contempt". The summons was served on an officer of the trust company.

Hamilton then gave notice that on Monday, November 30, 1942, he would appear before Judge Schwaba and move to set down for hearing the examination of Stanley A. Stamberg, Trust Officer of the Trust Company of Chicago, concerning the assets of defendant Country Club Properties, Inc. February 24, 1943, Judge Schwaba entered an order dismissing the citation and discharging the Trust Company of Chicago. This appeal is by Hamilton from that order. He asks for a judgment against the Trust Company of Chicago for \$250 and that the trust company convey to the sheriff of McHenry County, Illinois, certain real estate in order that the same may be sold by said sheriff and the proceeds applied in satisfaction of his judgment against the corporation debtor.

From the report of proceedings made a part of the record it appears that on January 12, 1942, Hamilton, in his own behalf, and attorney Charles H. Borden appeared before Judge Schwaba; that Borden announced he had Mr. S. A. Stamberg, one of the Trust Officers of the company, present for examination. The court directed the witness be sworn "and then he can be taken into the back room and the attorney for the plaintiff can examine him". The witness was then sworn, taken into the room out of the presence of the judge and was examined. In response to questions he testified that he was an officer of the trust company; that he met F. J. Soiret, president

this Court and be examined under oath to discover assets of the Country Club Properties, Inc., a corporation, judgment debtor," etc. The summons issued on the same day. It recited: "To the above

named supplemental defendant: You are hereby summoned to answer the petition for citation to discover the assets of the defendant in the above entitled cause." It further stated: "If you do not appear according to the command of this writ, you may be proceeded against as for contempt". The summons was served on an officer of the trust company.

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From the report of proceedings made a part of the record it appears that on January 12, 1942, Hamilton, in his own behalf, and attorney Charles H. Borden appeared before Judge Schwab; that Borden announced he had Mr. S. A. Stamborg, one of the Trust Officers of the company, present for examination. The court directed the witness be sworn "and then he can be taken into the back room and the attorney for the plaintiff can examine him". The witness was then sworn, taken into the room out of the presence of the Judge and was examined. In response to questions he testified that he was an officer of the trust company; that he met F. J. Gofinet, president



3.

of the judgment debtor a few times. He also said the trust company held title to numerous lots in R. A. Cepak's Crystal Vista subdivision in McHenry County, Illinois; that it obtained title by deed from Eugene Irwin and Marcella M. Irwin, his wife. The deed was a deed of trust, recorded in McHenry County as document No. 150960. It was dated October 9, 1940, and recorded November 15, 1940. About the same time a number of contracts were turned over to the trust company with instructions to collect on them from persons who had purchased some of the lots. The vendor in such contracts was the Country Club Properties, Inc., by F. J. Soiret. These contracts were assigned to the trust company as trustee, and on these contracts the trust company had collected \$500 or \$600; part of the sum collected had been paid out for legal and other expenses, abstracts, etc., and a deduction was made for the acceptance fee due to the trust company; he would say offhand about \$250 was left out of the funds collected. There were back taxes on all the lots for at least ten years which the trust company would be expected to pay. The witness said: "We have the contracts there under which they were paid and those were made out to Country Club Properties, Inc., and assigned to us. We have no knowledge, or had no knowledge of any interest of Country Club Properties, Inc. Our only knowledge is it says the contracts were made with Country Club Properties, Inc., originally; it was their name at the bottom of the contract. I do not know who signed them; all I know is we have the contracts, they were assigned to us. The contracts were assigned to us on or about the time the Trust was opened, maybe a few weeks after that, somewhere in there." The witness produced a copy of the trust deed, which he said was given to the trust company originally. It is dated October 7, 1940. He said they had no trust deed where the original beneficiary was F. J. Soiret, and witness was not acquainted with either Soiret or Sara Anne Bergin, who was the beneficiary under the trust and who, the witness said he understood, had since married F. J. Soiret. The witness said he did not know who paid for the subdivision that was bought originally from Albers, the Receiver,



of the judgment debtor a few times. He also said the trust company held title to numerous lots in R. A. Gephart's Gravel Vista subdivision in McHenry County, Illinois; that it obtained title by deed from Eugene Irwin and Marcelle M. Irwin, his wife. The deed was a deed of trust, recorded in McHenry County as document No. 150080. It was dated October 9, 1940, and recorded November 13, 1940. About the same time a number of contracts were turned over to the trust company with instructions to collect on them from persons who had purchased some of the lots. The vendor in such contracts was the Country Club Properties, Inc., by F. J. Goret. These contracts were assigned to the trust company as trustees, and on these contracts the trust company had collected \$500 or \$600. Part of the sum collected had been paid out for legal and other expenses, abstracts, etc., and a deduction was made for the acceptance fee due to the trust company; he would say oftentimes about \$250 was left out of the funds collected. There were back taxes on all the lots for at least ten years which the trust company would be expected to pay. The witness said: "We have the contracts there under which they were paid and those were made out to Country Club Properties, Inc., and assigned to us. We have no knowledge, or had no knowledge of any interest of Country Club Properties, Inc. Our only knowledge is it says the contracts were made with Country Club Properties, Inc., originally; it was their name at the bottom of the contract. I do not know who signed them; all I know is we have the contracts, they were assigned to us. The contracts were assigned to us on or about the time the Trust was opened, maybe a few weeks after that, somewhere in there." The witness produced a copy of the trust deed, which he said was given to the trust company originally. It is dated October 7, 1940. He said they had no trust deed where the original beneficiary was F. J. Goret, and witness was not acquainted with either Goret or Sara Anne Bergin, who was the beneficiary under the trust and who, the witness said he understood, had since married F. J. Goret. The witness said he did not know who paid for the subdivision that was bought originally from Albert, the Receiver,

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and he didn't know anything about what took place prior to the trust company getting title. He was pretty sure there were taxes against all the lots. He did not know offhand how many of the lots were still unsold. Cross-examined by Mr. Borden the witness said the trust company had no dealings with any of the people from the office of or with the Country Club Properties, Inc., in connection with this trust. The beneficiary in the trust was Sara Anne Bergin. The copy of the trust agreement does not appear in the evidence.

Mr. Wix, who had been sworn as a witness, was then examined by Mr. Hamilton out of the presence of the judge. After answering a number of questions, Mr. Borden, for the trust company, stated: "We have no interest in the testimony of Mr. Wix. This is not a trial but merely a citation to obtain information from my client. We have merely remained this long in order to get our papers from you." Mr. Hamilton replied: "We are going to present this to the Judge". Mr. Borden: "I make the point now that the Court, so far as we are concerned, has no jurisdiction of anything except for the information which my client can give." The record recites that the documents were thereupon returned to Mr. Borden, and he and Mr. Stamberg left the room; that in their absence Mr. Hamilton further continued the examination of Mr. Wix. Stamberg was afterwards further examined. On February 24, 1943, on motion of respondent the citation was dismissed and respondent discharged. From that order Hamilton, the judgment creditor, appeals.

The purpose of a supplementary proceedings is not only discovery. The statute and rules of the Supreme and Superior Courts made pursuant thereto show clearly a design to provide a speedy and efficient remedy by which a judgment creditor may have property of the debtor not exempt from execution applied to the satisfaction of his judgment. Ill. Rev. Stat., 1943, Chap. 110, §73 (2), par. 197, p. 2432; Supreme Court Rule 26A; Superior Court Rule 35 1/2. These



and he didn't know anything about what took place prior to the trust company getting title. He was pretty sure there were loans against all the lots. He did not know offhand how many of the lots were still unsold. Cross-examined by Mr. Borden the witness said the trust company had no dealings with any of the people from the office of or with the Country Club Properties, Inc., in connection with this trust. The beneficiary in the trust was Anna Bergin. The copy of the trust agreement does not appear in the evidence.

Mr. Wix, who had been sworn as a witness, was then examined by Mr. Hamilton out of the presence of the judge. After answering a number of questions, Mr. Borden, for the trust company, stated: "We have no interest in the testimony of Mr. Wix. This is not a trial but merely a citation to obtain information from my client. We have merely remained this long in order to get our papers from you." Mr. Hamilton replied: "We are going to present this to the judge." Mr. Borden: "I make the point now that the Court, so far as we are concerned, has no jurisdiction of anything except for the information which my client can give." The record recites that the documents were thereupon returned to Mr. Borden, and he and Mr. Stenberg left the room; that in their absence Mr. Hamilton further continued the examination of Mr. Wix. Stenberg was afterwards further examined. On February 24, 1945, on motion of respondent the citation was dismissed and respondent discharged. From that order Hamilton, the judgment creditor, appeals.

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5.

give the courts, upon petition of the debtor, power to compel persons having property of the debtor to turn the same over, to render judgment against them or any of them, to punish for contempt, to tax costs, etc. In this case the plaintiff made only one supplementary defendant, the Trust Company of Chicago, The specific relief asked in its petition and indicated by the summons served was for discovery.

The examination, although out of the presence of the judge, is preserved by a report of proceedings made a part of the record. The evidence fails to show any property discovered which plaintiff would have any right to have turned over and applied on his debt. He says the court should have rendered judgment for \$250 as in garnishment. The evidence showed "about" \$250 in the hands of the trust company in a trust fund of which Mrs. Soiret was the beneficiary, but Mrs. Soiret is not a party to the proceeding and plaintiff did not ask to have her made a party. Plaintiff also says that the court should have directed the respondent to deed the McHenry County real estate to the sheriff of that county in order that it might be sold and applied on the judgment, but the evidence concerning this real estate is to the effect that it is not the property of the judgment debtor but held in trust by the trust company under a written agreement of which another is the beneficiary. The statute and the rules provide a way in which all parties interested may be brought in and their rights determined. Plaintiff did not take the path so clearly pointed out in the statute and the rules of the court. He has his judgment and the path is still open to him.

The order will be affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

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The order will be affirmed.

A. FIRMED.

42730

320 I.A. 689

LILLIAN NACON,

Appellee,

v.

IRA ISAACSON and ETHEL ISAACSON,  
Appellant.

APPEAL FROM

MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by defendants from a judgment for \$200 in favor of plaintiff, entered on the finding of the court. The action was in tort. The statement of claim alleged defendants, owners of a building in Chicago, occupied by the mother of plaintiff, negligently permitted a window sill to become in such a state of disrepair that while plaintiff was washing it, the sill of the window gave way and threw her to the ground, injuring her.

At the close of all the evidence there was a motion by defendants for a finding in their favor, which was denied; a motion for a new trial, in writing, also denied, and judgment for \$200, from which this appeal has been taken. Defendants say plaintiff's theory was that the landlords rented the premises with the defect therein concealed. This is neither alleged in the statement of claim nor proved on the trial.

The plaintiff has not appeared in this court to support the judgment. We have, however, given careful consideration to the record. The gist of defendant's contention in this court is that as a matter of law on the pleadings and evidence plaintiff was not entitled to recover, and this contention, we find, must be sustained.

The uncontradicted facts appearing from the evidence are that



3201A. 689

42720

WILLIAM WAGON, Appellee,

v.

IRA ISAACSON and ETHEL ISAACSON, Appellant.

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

This appeal is by defendants from a judgment for \$200 in favor of plaintiff, entered on the finding of the court. The action was in tort. The statement of claim alleged defendants, owners of a building in Chicago, occupied by the mother of plaintiff, negligently permitted a window sill to become in such a state of disrepair that while plaintiff was leaning it, the sill of the window gave way and threw her to the ground, injuring her.

At the close of all the evidence there was a motion by defendants for a finding in their favor, which was denied; a motion for a new trial, in writing, also denied, and judgment for \$200, from which this appeal has been taken. Defendants say plaintiff's theory was that the landlords rented the premises with the defect therein concealed. This is neither alleged in the statement of claim nor proved on the trial.

The plaintiff has not appeared in this court to support the judgment. We have, however, given careful consideration to the record. The gist of defendant's contention in this court is that as a matter of law on the pleadings and evidence plaintiff was not entitled to recover, and this contention, we find, must be sustained.

The uncontradicted facts appearing from the evidence are that

2.

defendants were the owners of the premises known as 2204 North Leavitt Street in Chicago. These were improved by a frame flat building. The second flat was occupied by the mother of plaintiff, Anna Naconieczwa, she having leased the flat from defendants and taken possession on two days before the occurrence of which plaintiff complains. Plaintiff did not live with her mother but lived at 2151 North Belle Avenue in Chicago, was 27 years of age and unmarried. On September 11, 1939, she was at the flat assisting her mother in cleaning, etc. In particular she was assisting in washing the windows. Plaintiff says she got out on the ledge as far as she could to clean the window, when the sill of the window fell, throwing her to a brick gangway about 12 or 13 feet below. She was seriously injured. It is not claimed the damages allowed are excessive. It does not appear from the record whether the lease between plaintiff's mother and defendants was oral or written, or what the terms of it were. Plaintiff says when she sat on the window sill, it "looked good on top". There is no proof as to whether defendants or plaintiff's mother were to make the repairs nor any proof that the owners retained control of any part of the leased premises for any purpose whatsoever. It is the general rule of law that a landlord is not liable for injuries that occur to persons on the premises leased to a tenant who is in possession and has control of the premises. This general rule of law is so well known that it would seem hardly necessary to cite authorities. We call attention, <sup>however,</sup> to Borggard v. Gale, 205 Ill. 511; Murphy v. Illinois State Trust Co., 375 Ill. 310; Breazeale v. Chicago Title & Trust Co., 293 Ill. App. 269, and Soibel v. The Oconto Co., 299 Ill. App. 518. In the Murphy case, at page 312, the opinion states:

" Under this error defendant states the general rule that a landlord is not liable for injuries that occur to persons on the premises leased to a tenant and under the tenant's control, and contends the rule applies not only to the enclosed portions included in the leasing but extends to the entrances, passage-ways, cellarways and portions which are not



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Leavitt Street in Chicago. These were improved by a frame flat  
building. The second flat was occupied by the mother of plaintiff.  
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to cite authorities. We call attention, however, to Hornard v. Gale, 203  
Ill. 511; Murphy v. Illinois State Trust Co., 275 Ill. 310; Bresnahan v.  
Chicago Title & Trust Co., 295 Ill. App. 281, and Reibel v. The Oceanic  
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leasing but extends to the entrance, passage-



under the exclusive control of the landlord. In support of such principle he cites cases such as Marcovitz v. Hergenrether, 302 Ill. 162, and West Chicago Masonic Ass'n. v. Cohn, 192 id. 210. Plaintiff recognizes the general rule of liability of a landlord to be as stated by the defendant, but contends the evidence in this case shows defendant exercised such control over the back porch and cellarway as to bring the case within the rule announced in cases such as Payne v. Irvin, 144 Ill. 482, Mueller v. Phelps, 252 id. 630, and Burke v. Hulett. 216 id. 545."

In the Breazeale case this court said, at page 271:

"There is no duty on a landlord to make repairs of a leased apartment unless he has assumed such duty by express agreement. Cromwell v. Allen, 151 Ill. App. 404. The opinion in that case examines extensively the law on the subject. The cases cited in plaintiff's brief which it is said hold to the contrary are cases involving some part of the building used in common by all the tenants and not in the exclusive possession of any one tenant."

In the Soibel case, at page 521, we said:

"The liability of defendant landlords to plaintiff, the tenant's employee, was no greater than their liability to the tenant. Shields v. Dole Co., 186 Ill. App. 250; 1 Tiffany on Landlord and Tenant, 556. It is also the law that where premises are leased and the lessee takes possession, in the absence of concealment or fraud by the landlord as to some defect known to him and unknown to the tenant, the tenant assumes the risk of personal injury from defects. And this rule is not changed by the fact that the lessor at the time of the letting covenants to repair. Borggard v. Gale, 205 Ill. 511; Breazeale v. Chicago Title & Trust Co., 293 Ill. App. 269."

see also Glerken v. Cohen, 315 Ill. App. 222.

For the reasons stated the judgment of the Municipal Court must be reversed.

REVERSED.

O'Connor, P. J., and Niemeyer, J., concur.

under the exclusive control of the landlord. In support of such principle, he cites cases such as Marovitz v. Hertzberg, 302 Ill. 132, and W. at Chicago Masonic Hall v. Conn., 132 Ill. 210. Plaintiff recognizes the general rule of liability of a landlord to be as stated by the defendant, but contends the evidence in this case shows defendant exercised such control over the back porch and cellars as to bring the case within the rule announced in cases such as Payne v. Levin, 144 Ill. 482, Kneller v. Phelps, 322 Ill. 630, and Burns v. Huest, 312 Ill. 545."

In the Breskale case this court said, at page 271:

"There is no duty on a landlord to make repairs of a leased apartment unless he has assumed such duty by express agreement. Gronwell v. Allen, 151 Ill. App. 404. The opinion in that case examines extensively the law on the subject. The cases cited in plaintiff's brief which it is said hold to the contrary are cases involving some part of the building used in common by all the tenants and not in the exclusive possession of any one tenant."

In the Gobel case, at page 521, we said:

"The liability of defendant landlords to plaintiff, the tenant's employee, was no greater than their liability to the tenant. Galish v. Dole Co., 138 Ill. App. 230; 1 Tiffany on Landlord and Tenant, 536. It is also the law that where premises are leased and the lessee takes possession, in the absence of concealment or fraud by the landlord as to some defect known to him and unknown to the tenant, the tenant assumes the risk of personal injury from defects. And this rule is not changed by the fact that the lessor at the time of the letting covenants to repair. Borward v. Gale, 308 Ill. 511; Breskale v. Chicago Title & Trust Co., 328 Ill. App. 269."

See also Olekan v. Cohen, 312 Ill. App. 232.

For the reasons stated the judgment of the Municipal

Court must be reversed.

NEVER REVERSED.

42660

320 I.A. 689<sup>-2</sup>

LILLIAN GOLDBERG,  
Appellant,

v.

CHRIST GEORGEADIS,  
Appellee.

APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover \$770 rent and \$612.49, money necessarily paid out because of defendant's alleged breach of a lease covering premises occupied by defendant as a steam laundry from September 1, 1939 to January 31, 1941. The jury found for the defendant and, judgment having been entered upon the verdict, plaintiff appeals.

The complaint charges the execution of a lease between plaintiff and defendant on September 1, 1939 covering the premises involved, for one year from said date at a yearly rental of \$1,200, payable in monthly installments; that defendant entered upon the premises and occupied the same during the term covered by the lease and up to February 1, 1941; that about June 1, 1940 plaintiff agreed with defendant to lease the premises for another year, from September 1, 1940 to August 31, 1941 at an annual rental of \$1,320, payable in monthly installments of \$110 each; that a lease was prepared under said terms and executed and delivered by plaintiff to defendant about July 1, 1940, and that defendant retained the lease and failed to return it to plaintiff; that on September 3, 1940 the plaintiff orally agreed with defendant to extend the old lease for the premises for another year at the rental of \$110 per month; that defendant continued



3221A 000

1230

WILLIAM GEORGE, Defendant,

v.

CHRIST GEORGEADIS, Plaintiff.

COURT OF  
COMMON PLEAS

THE JUSTICE HATHWAY HALLWAY THE CHIEF OF THE COURT.

Plaintiff brought suit to recover \$270 rent and \$11.44 money necessarily paid out because of defendant's failure to pay of a lease covering premises occupied by defendant as a steam laundry from September 1, 1939 to January 31, 1941. The jury found for the defendant and, judgment having been entered upon the verdict, plaintiff appeals.

The complaint charges the execution of a lease between plaintiff and defendant on September 1, 1939 covering the premises involved, for one year from said date at a yearly rental of \$1,500, payable in monthly installments; that defendant entered upon the premises and occupied the same during the term covered by the lease and up to February 1, 1941; that about June 1, 1940 plaintiff agreed with defendant to lease the premises for another year, from September 1, 1940 to August 31, 1941 at an annual rental of \$1,200, payable in monthly installments of \$110 each; that a lease was produced under said terms and executed and delivered by plaintiff to defendant about July 1, 1940, and that defendant retained the lease and failed to return it to plaintiff; that on September 3, 1940 the plaintiff orally agreed with defendant to extend the old lease for the premises for another year at the rental of \$110 per month; that defendant continued

2.

in possession of the premises to and including January 31, 1941 and paid the monthly installments of \$110 to that day. Plaintiff seeks to recover rent from the abandonment of the premises until August 31, 1941.

The answer of the defendant denies any agreement with plaintiff to lease the premises from September 1, 1940 to August 31, 1941 at an annual rental of \$1,320 or anybother amount; admits continuing in possession to and including January 31, 1941, but says that such possession <sup>as</sup> was ~~a~~ month to month tenant under an oral agreement between plaintiff and defendant.

Plaintiff's principal contentions are that the claim of defendant that he was a month to month tenant is not supported by any evidence in the record, and that the court erred in giving instructions on behalf of the defendant that the burden of proof rested upon the plaintiff. Plaintiff's action was brought by Mr. Philip J. Simon, as attorney for plaintiff; the complaint was dictated by Mr. Jacob Levy, an attorney, and sworn to by him; as attorney for the plaintiff he conducted all negotiations with defendant for the renewal or extension of the first lease and is the sole witness in plaintiff's behalf; he made practically all objections that were made to the testimony offered or introduced on behalf of defendant, cross-examined the defendant - mainly about conversations and transactions had with himself, and in rebuttal again took the witness stand on behalf of his client; he appears in this court as counsel for plaintiff. It is apparent, although his name does not appear ofvrecord, that he was the principal attorney for the plaintiff in the trial below. This practice of lawyers appearing as witnesses on behalf of their clients while participating in the trial of the case has beenvrepeatedly condemned and the testimony held to be entitled to little weight. Wiederhold v. Wiederhold, 305 Ill. 429; Beninca v. Nardiello, 320 Ill. 181; Grescio v. Grescio, 365 Ill. 393; Pippert v. Schiele, 315 Ill. App. 563.

in possession of the premises to and including January 31, 1941 and  
paid the monthly installments of \$10 to that day. Plaintiff seeks  
to recover rent from the abandonment of the premises until August 31,

1941.

The answer of the defendant denies any agreement with plaintiff  
to lease the premises from September 1, 1940 to August 31, 1941 at an  
annual rental of \$1,350 or any other amount; admits continuing in  
possession to and including January 31, 1941, but says that such possession  
was always a month to month tenancy under an oral agreement between  
plaintiff and defendant.

Plaintiff's principal contentions are that the claim of  
defendant that he was a month to month tenant is not supported by any  
evidence in the record, and that the court erred in giving instructions  
on behalf of the defendant that the burden of proof rested upon the  
plaintiff. Plaintiff's action was brought by Mr. Philip A. Simon, as  
attorney for plaintiff; the complaint was dictated by Mr. Jacob Levy,  
an attorney, and sworn to by him; an attorney for the plaintiff he  
conducted all negotiations with defendant for the renewal or extension  
of the first lease and is the sole witness in plaintiff's behalf;  
he made practically all objections that were made to the testimony  
offered or introduced on behalf of defendant, cross-examined the  
defendant - mainly about conversations and transactions had with  
himself, and in rebuttal again took the witness stand on behalf  
of his client; he appears in this court as counsel for plaintiff.  
It is apparent, although his name does not appear otherwise, that he  
was the principal attorney for the plaintiff in the trial below. This  
practice of lawyers appearing as witnesses on behalf of their clients  
while participating in the trial of the case has been repeatedly  
condemned and the testimony held to be entitled to little weight.  
Leiderhold v. Leiderhold, 305 Ill. 499; Benina v. Nardella, 370  
Ill. 151; Gracio v. Gracio, 368 Ill. 383; Pinney v. Kahle, 375  
Ill. App. 563.



3.

Defendant testified that about July 5, 1940 he received from the witness Levy a letter enclosing two copies of a new lease at the increased rental of \$110 per month, unexecuted by plaintiff, and that he did not sign and return the leases; that in some conversation with Levy he told the latter that he would not sign the lease giving plaintiff the right to cancel same upon four months' notice unless he were given a like privilege; that Levy afterwards said, "You know if you don't sign that lease I could put you out any time, it will be a month to month tenancy on the premises." Upon termination of the original lease defendant paid \$110 per month during his occupancy of the premises, to and including January 31, 1941, when, pursuant to notice given in December preceding, he terminated what he claimed to be the month to month tenancy. The statement that if defendant did not sign the lease submitted he could be put out at any time - "it will be a month to month tenancy" - if made by Levy, showed plaintiff's intention not to consider defendant as a holdover tenant. Weber v. Powers, 213 Ill. 370. In view of the unsatisfactory character of the testimony on behalf of plaintiff, the jury could properly accept defendant's testimony as to Levy's statement and find for defendant as to the rent.

Plaintiff's objection to instructions on behalf of defendant requiring plaintiff to prove her case by a preponderance of the evidence, rests upon the theory, as argued in plaintiff's brief, that defendant having held over after the expiration of the original lease, there was an implied tenancy for another year at the modified rental of \$110 per month. Plaintiff contends, under the authority of Cottrell v. Gerson, 296 Ill. App. 412, 423, that the burden of establishing a new agreement where the tenant remains in possession is upon the tenant, not the landlord. Defendant answers that under the complaint filed plaintiff was not relying upon an implied contract created from the holding over but upon express agreements between the parties. An examination of the complaint supports this position. In paragraph 3 plaintiff specifically alleges an agreement of the

Defendant testified that about July 25, 1940 he received from the tenant a letter enclosing two copies of a new lease at an increased rental of \$110 per month, executed by Plaintiff, and that he did not sign and return the lease; that in some conversation with Levy he told the latter that he would not sign the lease. Plaintiff testified that he had no objection to the new lease which he was given a free privilege; that Levy afterwards said, "You know if you don't sign that lease I could put you out any time, it will be a month to month tenancy on the premises." Upon termination of the original lease defendant paid \$110 per month during his occupancy of the premises, to and including January 31, 1941, when, pursuant to notice given in December preceding, he terminated what he claimed to be the month to month tenancy. The statement that he defendant did not sign the lease submitted he would be put out at any time - "it will be a month to month tenancy" - it was by Levy, showed Plaintiff's intention not to consider defendant as a holdover tenant. Levy v. Powers, 210 Ill. 370. In view of the material story character of the testimony on behalf of Plaintiff, the jury could properly accept defendant's testimony as to Levy's statement and find for defendant as to the rent.

Plaintiff's objection to instructions on behalf of defendant requiring Plaintiff to prove her case by a preponderance of the evidence, rests upon the theory, as argued in Plaintiff's brief, that defendant having held over after the expiration of the original lease, there was an implied tenancy for another year at the modified rental of \$110 per month. Plaintiff contends, under the authority of Gottshall v. Pearson, 206 Ill. App. 412, 423, that the burden of establishing a new agreement was on the tenant remaining in possession as upon the tenant, not the landlord. Defendant answers that under the complaint filed Plaintiff was not relying upon an implied contract created from the holding over but upon express agreements between the parties. An examination of the complaint supports this position. In paragraph 3 of Plaintiff's complaint it is stated that on or about



4.

parties for a new lease, to be evidenced by a newly prepared and executed written lease. By the following paragraph plaintiff relies upon an oral agreement between the parties for the extension of the old lease. Nowhere is it alleged that defendant held over without any agreement and plaintiff thereupon elected, as she might lawfully do, to hold defendant as a tenant for another year under the terms of the old lease except as modified as to the rental.

However, the court submitted the case to the jury on the theory of a holdover tenancy. Instruction 1, tendered by plaintiff, instructed the jury "that when a tenant continues in possession after the expiration of the original lease without any new agreement except as to the modification of an increase in rent per month, the tenant is presumed in law to be a hold-over under the terms of the original lease for another year from the expiration of the original lease, and if you find from the preponderance of the evidence that said defendant continued in possession of said premises after the expiration of the original lease up to January 31, 1941, without any new agreement except as to the modification of an increase in rent per month, then a year to year tenancy was created between the parties hereto and that the defendant Christ Georgeadis is liable for the rental of the premises for the balance of the term expiring August 31, 1941." Having thus assumed the burden of proof as to the absence of a new agreement, plaintiff cannot complain of the instructions tendered by defendant. McInturff v. Insurance Co. of N. A., 248 Ill. 92; Fickerle v. Seekamp, 274 Ill. App. 310. In this state of the record we need not consider what was said in the Cottrell case to the effect that a tenant holding over must establish by a preponderance of the evidence any new agreement claimed by him.

There is no merit in plaintiff's objection to the court's action in receiving in evidence the latter from witness Levy's office enclosing the unsigned leases and stating that after defendant signed same they would be signed by plaintiff. This evidence contradicts



parties for a new lease, to be evidenced by a newly prepared and executed written lease. By the following paragraph plaintiff relies upon an oral agreement between the parties for the extension of the old lease. Nowhere is it alleged that defendant held over without any agreement and plaintiff thereupon elected, at the right lawfully do, to hold defendant as a tenant for another year and the terms of the old lease except as modified as to the rental. However, the court admitted the case to the jury on the theory of a holdover tenancy. Instruction I, tendered by plaintiff, instructed the jury "that when a tenant continues in possession after the expiration of the original lease without any new agreement except as to the modification of an increase in rent per month, the tenant is presumed in law to be a hold-over under the terms of the original lease for another year from the expiration of the original lease, and if you find from the preponderance of the evidence that said defendant continued in possession of said premises after the expiration of the original lease up to January 31, 1941, without any new agreement except as to the modification of an increase in rent per month, then a year to year tenancy was created between the parties hereto and that the defendant Christ Georgiadis is liable for the rental of the premises for the balance of the term expiring August 31, 1941." Having thus assumed the burden of proof as to the absence of a new agreement, plaintiff cannot complain of the instructions tendered by defendant.

Plaintiff v. Insurance Co. of N. A., 248 Ill. 32; Fickels v. George, 274 Ill. App. 310. In this state of the record we need not consider what was said in the Gottlieb case to the effect that a tenant holding over must establish by a preponderance of the evidence any new agreement claimed by him.

There is no merit in plaintiff's objection to the court's action in receiving in evidence the letter from Messrs. Levy's office enclosing the unpaid lease and stating that after defendant signed same they would be signed by plaintiff. This evidence contradicts

5.

the complaint, sworn to by Levy, and his testimony on the trial that the leases sent to defendant had been signed by plaintiff. Plaintiff was urging that the failure of defendant to return leases signed by her effected a binding contract. Other objections to the evidence need not be considered. From what we have heretofore said of the little weight to be given to the testimony of Levy, the jury was justified in accepting defendant's testimony denying the alleged failure of defendant to keep the premises in repair.

The judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

the complaint, sworn to by Levy, and his testimony on the trial that the lease had been assigned by plaintiff. Plaintiff was urging that the failure of defendant to return lease assigned by her effected a binding contract. Other objections to the evidence need not be considered. From what we have heretofore said of the little weight to be given to the testimony of Levy, the jury was justified in accepting defendant's testimony denying the alleged failure of defendant to keep the premises in repair.

The judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and MacArthur, J., concur.



42663

320 I.A. 630

ELDRA HAGUE, Plaintiff,

vs.

EDITH M. KIESTER, etc., et al.,  
Defendants.

EDITH M. KIESTER,  
Counter-claimant and  
Counter-defendant,  
Appellant,

vs.

CHARLES BUSAM,  
Counter-defendant and  
Counter-claimant,  
Appellee.

APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This appeal involves a contest between Edith M. Kiester, and Charles Busam, over the distribution of the estates of their father and mother. As each of the parties is a counter-claimant and counter-defendant they will be referred to as appellant and appellee.

The father, William Busam, died March 8, 1932, and the mother, Paulina M. Busam, died March 25, 1932, each leaving as his or her only heirs the three children- appellant, appellee and Eldra Hague, plaintiff. The will of William Busam is not in the record, but it appears from the final account in his estate that he gave \$300 to plaintiff and divided the remainder of his estate between appellant and appellee. Appellee was executor and trustee. By the will of Paulina M. Busam the estate was divided into three equal parts, appellant and appellee each receiving a part - and a third part - from which \$500 was to be deducted and paid in equal parts to appellant and appellee-to be held in trust for Eldra Hague during her lifetime. Appellant was executrix and trustee under this will. Both estates

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42303

Circuit Court,  
Cook County,

WILMA HAGUE, Plaintiff,  
vs.  
EDITH M. WIESTER, et al., Defendants.

EDITH M. WIESTER, Counter-claimant and Counter-defendant, Appellant,  
vs.  
CHARLES BUESS, Counter-defendant and Counter-claimant, Appellee.

MR. JUSTICE WIESTER DELIVERED THE OPINION OF THE COURT.

This appeal involves a contest between Edith M. Wiester, and Charles Buess, over the distribution of the estates of their father and mother. As each of the parties is a counter-claimant and counter-defendant they will be referred to as appellant and appellee. The father, William Buess, died March 6, 1932, and the mother, Pauline M. Buess, died March 28, 1932, each leaving as his or her only heirs the three children - appellant, appellee and Edith Hague, plaintiff. The will of William Buess is not in the record, but it appears from the final account in his estate that he gave \$500 to plaintiff and divided the remainder of his estate between appellant and appellee. Appellee was executor and trustee. By the will of Pauline M. Buess the estate was divided into three equal parts, appellant and appellee each receiving a part - and a third part - from which \$300 was to be deducted and paid in equal parts to appellant and appellee to be held in trust for Edith Hague during her lifetime. Appellant was executrix and trustee under this will. Both estates

2.

were closed and distribution made on February 7, 1935, except that certificates covering appellee's one-third interest in Cohler and Briard bonds of the parbvalue of \$700 were not delivered to him.

The estate of William Busam, after the payment of the \$300 bequest to plaintiff and all debts and expenses, amounted to \$7,570.69, which was to be divided equally between appellant and appellee. According to the 1935 report of the appellant the estate of the mother amounted to \$15,521.06, or \$5,173.69 in each share. However, appellant, as executrix, inadvertently paid out of the estate, before distribution, the \$250 bequests which under the will should have been deducted from the share of the estate to be held in trust for plaintiff. At the closing of the estates proper receipts for their respective shares were given by appellant and appellee. Appellant proceeded to administer the trust estate for the benefit of plaintiff.

In April 1937, plaintiff instituted this suit for a termination of the trust and an accounting as to same, and made defendants thereto, appellant and appellee, individually and as executrix, or executor and as trustee under the respective wills of the mother and father. Appellant filed a counterclaim alleging that appellee had failed to pay over to her all that was due from the father's estate. Appellee likewise filed a counterclaim alleging the erroneous payment of the \$250 bequests to himself and appellant out of the corpus of the mother's estate rather than out of the one-third part set aside for the benefit of plaintiff. Answers were filed to the counterclaims. Appellant then went into the Probate court of Cook county and in October 1937 obtained leave to amend her final report, upon which distribution had been made in 1935, by charging herself with the \$500 paid to herself and appellee and crediting herself with additional expenditures of \$65.50 covering commissioners' fees and additional court costs on the hearings on the amendment of the report. She then deducted from the share held for the benefit of plaintiff the \$500 above mentioned. A consent decree settling all claims of plaintiff



were closed and distribution made on February 7, 1935, except that certificates covering appellee's one-third interest in Goflor and Brian bonds of the parvalue of \$700 were not delivered to him. The estate of William Bussam, after the payment of the \$300 pedesat to plaintiff and all debts and expenses, amounted to \$7,570.89, which was to be divided equally between appellant and appellee. According to the 1935 report of the appellant the estate of the mother amounted to \$15,521.08, or \$5,173.69 in each share. However, appellant, as executrix, inadvertently paid out of the estate, before distribution, the \$250 pedesat which under the will should have been deducted from the share of the estate to be held in trust for plaintiff. At the closing of the estates proper receipts for their respective shares were given by appellant and appellee. Appellant proceeded to administer the trust estate for the benefit of plaintiff. In April 1937, plaintiff instituted this suit for a termination of the trust and an accounting as to same, and made defendants thereto, appellant and appellee, individually and as executrix, or executor and as trustees under the respective wills of the mother and father. Appellant filed a counterclaim alleging that appellee had failed to pay over to her all that was due from the father's estate. Appellee likewise filed a counterclaim alleging the erroneous payment of the \$250 pedesat to himself and appellant out of the corpus of the mother's estate rather than out of the one-third part set aside for the benefit of plaintiff. Answers were filed to the counterclaims. Appellant then went into the Probate court of Cook county and in October 1937 obtained leave to amend her final report, upon which distribution had been made in 1935, by charging herself with the \$500 paid to herself and appellee and crediting herself with additional expenditures of \$52.50 covering commissioners' fees and additional court costs on the hearings on the amendment of the report. She then deducted from the share held for the benefit of plaintiff the \$500 above mentioned. A consent decree settling all claims of plaintiff

3.

was entered in this suit without prejudice to the rights of the parties to this appeal under their respective counterclaims.

The accounting matters were referred to a master, who rendered an amended report finding appellant indebted to appellee in the sum of \$201.65. On hearing before the chancellor this report was disapproved and the cause rereferred to the master with directions to state the accounts due said parties as beneficiaries under the wills of Paulina M. Busam and William Busam, respectively, commencing with the distribution of such estates as shown by the final accounts approved by the Probate court of Cook county therein. On this rereference the master found appellant indebted to appellee in the sum of \$23.94, with interest thereon. This report was approved and a decree entered fixing the indebtedness of appellant to appellee, at \$33.09, and further directing the master to turn over to appellee the Cohler and Briard bonds of the face value of \$233.33, being part of appellee's distributive share of the estate of the mother. The decree also taxed all costs of the proceedings, including the master's fees of \$361.35, against appellant.

Appellant appeals, questioning the ruling of the trial court in respect to a note for \$525, executed by appellee in 1912 and claimed to be a part of the mother's estate, and in respect to a note signed by Frank V. Mellien and Gladys Mellien dated July 13, 1930, for \$300, on which execution had been issued and returned unsatisfied, and further, attacking the amount found due from appellant and appellee as being against the manifest weight of the evidence. Appellee insists upon upholding the rulings of the trial court except as to the amount found due him, which, by cross-error informally assigned, he asks be increased to \$144.83, with interest from February 7, 1935.

In her amended final account as executrix of her mother's estate appellant shows the \$525 note executed by appellee in 1912, with a finding of the Probate court against the estate on the note and a like finding on appeal to the Circuit court. On the settle-



was entered in this suit without prejudice to the rights of the parties to this appeal under their respective counterclaims. The accounting matters were referred to a master, who rendered an amended report finding appellant indebted to appellee in the sum of \$201.65. On hearing before the chancellor this report was disapproved and the cause referred to the master with directions to state the accounts due said parties as beneficiaries under the will of Paulina M. Buzam and William Buzam, respectively, commencing with the distribution of such estates as shown by the final accounts approved by the probate court of Cook county therein. On this reference the master found appellant indebted to appellee in the sum of \$23.94, with interest therein. This report was approved and a decree entered fixing the indebtedness of appellant to appellee, at \$23.09, and further directing the master to turn over to appellee the Golfer and Wizard bonds of the face value of \$23.38, being part of appellee's distributive share of the estate of the mother. The decree also taxed all costs of the proceedings, including the master's fees of \$331.35, against appellant.

Appellant appeals, questioning the ruling of the trial court in respect to a note for \$525, executed by appellee in 1912 and claimed to be a part of the mother's estate, and in respect to a note signed by Frank V. Melton and Gladys Melton dated July 12, 1930, for \$500, on which execution had been issued and returned unsatisfied, and further, attacking the amount found due from appellant and appellee as being against the manifest weight of the evidence. Appellee insists upon upholding the rulings of the trial court except as to the amount found due him, which, by cross-error informally assigned, he asks be increased to \$144.83, with interest from February 7, 1932.

In her amended final account as executrix of her mother's estate appellee shows the \$525 note executed by appellee in 1912, with a finding of the probate court against the estate on the note and a like finding on appeal to the Circuit court. On the settle-



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ment of the estates in 1935 this note was delivered by appellant to appellee, as shown by receipt signed by appellee and introduced in evidence by appellant. Appellee insists that all question of liability on this note was determined adversely to appellant by the findings of the Probate and Circuit courts, which are res judicata of the claim. With this contention we agree. Healea v. Verne, 343 Ill. 325. The final report of appellee in the estate of the father shows the judgment upon the Mellien note, mentioned above, with execution issued and returned unsatisfied, and that same was to be satisfied of record. Although in appellant's objections to the supplemental report of the master it is contended that this note was paid April 9, 1935, after the settlement of the estate, there is no evidence to support the claim.

In the master's supplemental report and in the decree appellee is charged with cash paid to him - apparently in the 1935 settlements, of \$141.02, and with goods and chattels of \$14. Appellee insists that there is no evidence to substantiate these findings. Appellant does not point out any evidence supporting them, and after a careful examination of the record we are unable to find any. The evidence shows conclusively that, excepting appellee's interest in the Cohler and Briard bonds, and the error in deducting the specific bequests of \$250 to appellant and appellee from the corpus of the mother's estate, each received all that they were entitled to from the other and from the estates of the father and mother. Apparently the error in paying these bequests from the corpus of the estate, instead of the share put aside for the benefit of plaintiff, was an honest mistake not discovered until after the institution of this suit. When appellant corrected her account as executrix in the Probate court on October 18, 1937, and deducted the \$500 from the trust estate held by her as trustee for plaintiff, she became liable to pay to the appellee his proportionate share - \$144.83, and the master and trial court should have so found. Appellant does not

ment of the estate in 1935 this note was delivered by appellant to appellee, as shown by receipt signed by appellee and introduced in evidence by appellant. Appellee insists that all question of liability on this note was determined adversely to appellant by the findings of the probate and circuit courts, which are not indicated of the claim. With this contention we agree. Hessler v. Verne, 343 Ill. 328. The final report of appellee in the estate of the father shows the judgment upon the Hessler note, mentioned above, with execution issued and returned unsatisfied, and that same was to be satisfied of record. Although in appellant's objections to the supplemental report of the master it is contended that this note was paid April 9, 1935, after the settlement of the estate, there is no evidence to support the claim.

In the master's supplemental report and in the decree appellee is charged with cash paid to him - apparently in the 1935 settlements, of \$141.02, and with goods and chattels of \$14. Appellee insists that there is no evidence to substantiate these findings. Appellant does not point out any evidence supporting them, and after a careful examination of the record we are unable to find any. The evidence shows conclusively that, excepting appellee's interest in the Gouler and Huard bonds, and the error in deducting the specific bequests of \$250 to appellant and appellee from the corpus of the mother's estate, each received all that they were entitled to from the other and from the estates of the father and mother. Apparently the error in paying these bequests from the corpus of the estate, instead of the share put aside for the benefit of plaintiff, was an honest mistake not discovered until after the institution of this suit. When appellant corrected her account as executrix in the probate court on October 18, 1937, and deducted the \$200 from the trust estate held by her as trustee for plaintiff, she became liable to pay to the appellee his proportionate share - \$144.83, and the master and trial court should have so found. Appellant does not

5.

contend that she made any payments to the appellee after the 1935 settlement.

The decree appealed from is modified by changing the sum due from appellant to appellee and directed to be paid by her to him, to \$188.87, being the sum of \$144.83, with interest thereon at the rate of 5 per cent per annum from October 18, 1937. In all other respects the decree is affirmed.

DECREE MODIFIED AND AFFIRMED.

O'Connor, P.J., and Matchett, J., concur.



contend that she made any payments to the appellee after the 1934

settlement.

The decree appealed from is modified by changing the two one from appellant to appellee and directed to be paid by her to him, to \$128.87, being the sum of \$144.83, with interest thereon at the rate of 5 per cent per annum from October 18, 1937. In all other respects the decree is affirmed.

DECREE MODIFIED AND AFFIRMED.

O'Connor, P. J., and MacBeth, J., concur.

320 I.A. 600<sup>2</sup>

42717

NORMAN P. JOHNSON,  
Appellee,

v.

THE BORDEN COMPANY, a corporation,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$600 entered against it in a personal injury action tried before the court without a jury. No question is raised as to the amount of the damages. Defendant's main contention is that the evidence shows that plaintiff was guilty of contributory negligence as a matter of law.

The accident occurred at about 11 o'clock in the forenoon on a bright, clear day in September at the intersection of an alley, west of Sheridan Road, with the sidewalk on the south side of Dakin street, in Chicago. The alley is about 12 feet wide; the sidewalk along Dakin street is 5 or 5 1/2 feet in width; on the east side of the alley, extending along Dakin street for a number of feet and immediately adjoining the alley and the sidewalk, are the side and rear brick walls of a theater building, having an entrance on Sheridan Road; to the west of the alley and back several feet from the sidewalk is a flat-building in which plaintiff lived. At the time of the accident plaintiff was an automobile mechanic, conducting his business in a garage in the rear of his home. He had repaired an automobile and parked it on the south side of Dakin street, 10 or 15 feet east of the alley. After telling the owner how to start the car he walked west along the center or south side of the sidewalk toward his home when

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42717

NORMAN P. JOHNSON,  
Appellee,

v.

THE BORDEN COMPANY, a corporation,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE WHEATYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$800 entered against it in a personal injury action tried before the court without a jury. No question is raised as to the amount of the damages. Defendant's main contention is that the evidence shows that plaintiff was guilty of contributory negligence as a matter of law.

The accident occurred at about 11 o'clock in the forenoon on a bright, clear day in September at the intersection of an alley, west of Sheridan Road, with the sidewalk on the south side of Dakin street, in Chicago. The alley is about 12 feet wide; the sidewalk along Dakin street is 5 or 6 1/2 feet in width; on the east side of the alley, extending along Dakin street for a number of feet and immediately adjoining the alley and the sidewalk, are the side and rear brick walls of a theater building, having an entrance on Sheridan Road; to the west of the alley and back several feet from the sidewalk is a first building in which plaintiff lived, at the time of the accident plaintiff was an automobile mechanic, conducting his business in a garage in the rear of his home. He had repaired an automobile and parked it on the south side of Dakin street, 10 or 15 feet east of the alley. After telling the owner how to start the car he walked west along the center or south side of the sidewalk toward his home when



2.

he came in contact with the right rear wheel of defendant's electric milk truck emerging from the alley in a northerly direction.

Plaintiff's alleged contributory negligence must be considered independently of defendant's alleged negligence. Prill v. City of Chicago, 317 Ill. App. 202. Defendant's driver testified that he had made a delivery in the alley about 50 feet south of Dakin street; that he proceeded north in the alley; that he stopped, before reaching the sidewalk, just south of a telegraph pole, shown by plaintiff's testimony to be about 9 feet from the walk; that he then blew his horn and proceeded out of the alley in first speed, which could not be over 5 miles per hour, and had gotten on the walk, even with plaintiff, when he saw him walking toward the truck; that he called to plaintiff and heard (felt) the bump as his right rear wheel ran over plaintiff's left foot; that he stopped the truck within a foot or two.

Plaintiff testified that as you approach the alley you have to take a step off the sidewalk to look down the alley; that no horn was sounded; that just as he stepped off the walk the truck came through and ran over his foot and stopped about 10 feet away; that he did not think those electric cars could go over 12 or 15 miles; that when he first saw the truck one foot was on the sidewalk and one foot in the alley; that it was a blur; that he saw it just about an instant before it hit him; that seeing and feeling it were so close together he could not tell if one was before the other or at the same time; that the right rear wheel hit his left foot; that he did not see the truck before it crossed the sidewalk, the first time he saw it being at the instant of impact or a split second before.

Plaintiff was familiar with the location at which this accident occurred. His view to the south was obstructed until he was practically at the alley, depending upon what part of the sidewalk he was walking. It is obvious that this truck - which is about 5 feet wide and which the driver drove while in a standing position, about 2 1/2 feet from the front of the truck where the windshield came straight down - could be seen by a person walking on the sidewalk

he came in contact with the right rear wheel of defendant's electric milk truck emerging from the alley in a northerly direction.

Plaintiff's alleged contributory negligence must be considered

independently of defendant's alleged negligence. Prill v. City of

Chicago, 217 Ill. App. 202. Defendant's driver testified that he had made a delivery in the alley about 30 feet south of Dakin street; that he proceeded north in the alley; that he stopped, before reaching the sidewalk, just south of a telegraph pole, shown by plaintiff's

testimony to be about 9 feet from the walk; that he then blew his horn and proceeded out of the alley in first speed, which could not be over 5 miles per hour, and had gotten on the walk, even with plaintiff,

when he saw him walking toward the truck; that he called to plaintiff and heard (felt) the bump as his right rear wheel ran over plaintiff's left foot; that he stopped the truck within a foot or two.

Plaintiff testified that as you approach the alley you have

to take a step off the sidewalk to look down the alley; that no horn was sounded; that just as he stepped off the walk the truck came through and ran over his foot and stopped about 10 feet away; that he did not think those electric cars could go over 12 or 13 miles; that when he first saw the truck one foot was on the sidewalk and one foot in the alley; that it was a blur; that he saw it just about an instant before it hit him; that seeing and feeling it were so close together he could not tell if one was before the other or at the same time; that the right rear wheel hit his left foot; that he did not see the truck before it crossed the sidewalk, the first time he saw it being at the instant of impact or a split second before..

Plaintiff was familiar with the location at which this accident occurred. His eye to the north was obstructed until he was practically at the alley, depending upon what part of the sidewalk he was walking. It is obvious that this truck - which is about 3 feet wide and which the driver drove while in a standing position, about 2 1/2 feet from the front of the truck where the windshield came straight down - could be seen by a person walking on the sidewalk



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before he stepped into the alley. By plaintiff's own testimony he did not see the truck - and then only a blur - until the time of impact or an instant before, at which time the truck - traveling at a speed which could not exceed 15 miles, according to plaintiff, and which was not in excess of 5 miles according to the driver - had advanced so far out of the alley that the right rear wheel was about the middle of the sidewalk. It is apparent from this testimony that plaintiff failed to make any effort to ascertain if any vehicle was coming out of the alley from the south; that he failed to see the truck crossing his path, and that by reason thereof he walked into the side of the truck so that the right rear wheel ran over his foot. This is negligence as a matter of law. Weiner v. Kjelstad, 314 Ill. App. (abst.) 671; DeJager v. Vandenberg, 288 Mich. 136; Joubert v. American Employers Ins. Co., 167 So. (La. App.) 221; Vol.3 Berry on Automobiles (7th ed.) sec. 3.210.

The judgment of the Superior court is reversed and judgment entered here in favor of the defendant.

REVERSED AND JUDGMENT HERE FOR DEFENDANT.

O'Connor, P. J., concurs.

Matchett, J., dissents.

I think the trial judge who saw and heard the witnesses could reasonably find that the negligence of the defendant's driver was the sole proximate cause of plaintiff's injury.



before stepped into the alley. By plaintiff's own testimony he did not see the truck - and then only a blur - until the time of impact or instant before, at which time the truck - traveling at a speed which could not exceed 15 miles, according to plaintiff, and which was not in excess of 5 miles according to the driver - had advanced so far out of the alley that the right rear wheel was about the side of the sidewalk. It is apparent from this testimony that plaintiff failed to make any effort to ascertain if any vehicle was coming out of the alley from the south; that he failed to see the truck crossing his path, and that by reason thereof he walked into the side of the truck so that the right rear wheel ran over his foot. This negligence is a matter of law. Winer v. Kleist, 224 Ill. App. 2d. 671; Delzer v. Vandenberg, 288 Mich. 158; Touhey v. American Employers Ins. Co., 157 So. 2d. 231; Vol. 2 Berry on Automobiles (7th ed.) sec. 3, 215.

The judgment of the Superior court is reversed and judgment entered in favor of the defendant.

REVEREND AND JUDGMENT HERE FOR DEFENDANT.

ORDER, P. 1, corrected.  
Page 1, 1, corrected.

I think the trial judge who saw and heard the witnesses of reasonably find that the negligence of the defendant's driver was the sole proximate cause of plaintiff's injury.







# RESERVE BOOK

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Opinions

V.320

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10-11-78	<i>R.P. Mord</i>	008	466
11-15-78	<i>J. Lupton</i>	017	693

